

No. 87-7028-CFY
Status: GRANTED

Title: John M. Mistretta, Petitioner
v.
United States

Docketed:
May 20, 1988

Court: United States Court of Appeals
for the Eighth Circuit

Vide:
87-1904

Counsel for petitioner: Morrison, Alan B.

Counsel for respondent: Solicitor General

Rule 18 petition for certiorari before judgement

Entry	Date	Note	Proceedings and Orders
1	May 20 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 20 1988		Brief amicus curiae of respondent United States Sentencing Commission filed. VIDE.
4	May 24 1988		DISTRIBUTED. June 9, 1988
5	May 26 1988	X	Brief amicus curiae of United States Senate filed. VIDE.
7	Jun 13 1988		The petition for a writ of certiorari before judgment is granted. *****
8	Jun 16 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
10	Jun 21 1988	G	Motion of Solicitor General for divided argument to permit United States Sentencing Commission to participate in oral argument as amicus curiae and for additional time for oral argument filed.
11	Jun 21 1988		Memorandum in support of motion for divided argument filed by U.S. Sentencing Commission.
12	Jun 21 1988		Memorandum in support of motion for divided argument filed by U.S. Senate.
9	Jun 27 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
13	Jun 30 1988		Motion of Solicitor General for divided argument to permit United States Sentencing Commission to participate in oral argument as amicus curiae and for additional time for oral argument GRANTED. and 20 additional minutes are allotted for that purpose to be divided as follows: Mistretta - 40 minutes; the Solicitor General - 25 minutes; and the United States Sentencing Commission - 15 minutes.
14	Jul 15 1988		Set for argument. Wednesday, October 5, 1988. This case is consolidated with 87-1904. (3rd case) (1 hr., 20 min.)
15	Jul 28 1988		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed. VIDE.
16	Jul 28 1988		Brief of petitioner John M. Mistretta filed.
17	Aug 10 1988		CIRCULATED.
18	Aug 10 1988		Record filed.
		*	Certified copy or original record and sealed envelope received. (Vide 87-1904).
19	Aug 15 1988		Record filed.

2/10/88

Entry	Date	Note	Proceedings and Orders

		*	Certified original record received. (Vide 87-1904).
21	Aug 25 1988	X	Brief amicus curiae of United States Senate filed. VIDE.
20	Aug 29 1988	X	Brief amici curiae of Joseph DiGenova, et al. filed. VIDE.
22	Aug 29 1988	X	Brief amicus curiae of United States Sentencing Commission filed. VIDE.
23	Aug 29 1988	X	Brief of respondent United States filed. VIDE.
24	Aug 29 1988		Lodging received. (In 87-1904 also).
25	Sep 19 1988	X	Reply brief of petitioner John M. Mistretta filed. VIDE.
26	Oct 5 1988		ARGUED.

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No. ②

87-7028

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN M. MISTRETТА,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did Congress violate principles of separation of powers when it assigned to the Sentencing Commission, a body within the judicial branch, three of whose seven voting members must be Article III judges, the power to issue substantive, binding sentencing guidelines for federal crimes?

2. Did Congress make an excessive delegation of legislative authority to the Sentencing Commission to issue sentencing guidelines, where Congress failed to make basic policy choices and failed to establish intelligible principles to constrain the Commission regarding fundamental areas of the guidelines?

3. When Congress enacted a new determinate sentencing system in the Sentencing Reform Act, would it have intended to abolish parole and substantially curtail "good time," in the event that the sentencing guidelines, which form the core of the new system, were found to be unconstitutional and hence unenforceable?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Nancy L. Ruxlow was a co-defendant along with petitioner in the district court, and the United States Sentencing Commission appeared as amicus curiae.

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IN THE SUPREME COURT OF THE UNITED STATES
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No.

JOHN M. MISTRETTA,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner respectfully petitions for a writ of certiorari before judgment to review the judgment of the United States District Court for the Western District of Missouri in this case.

OPINION BELOW

The opinion of the United States District Court for the Western District of Missouri is not officially reported and is reproduced in the appendix to the companion petition filed by the United States, No. 87-1904, ("App.") at pages 1a-15a. The judgment of the district court is reproduced at App. 33a-40a.

JURISDICTION

The judgment of the district court was entered on April 18, 1988. App. 33a-40a. The notice of appeal was filed on April 19, 1988, App. 41a-44a, and the case was docketed in the court of appeals on April 22, 1988. App. 45a-46a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), as amended, are reproduced at App. 47a-85a.

STATEMENT OF THE CASE

1. The Sentencing Commission.

Under the Sentencing Reform Act of 1984, the United States Sentencing Commission was created and assigned the function of developing determinate sentencing guidelines for most federal crimes. The Commission is composed of seven voting members who are appointed by the President with the advice and consent of the Senate for six year terms. 28 U.S.C. § 991(a). The President may reappoint Commissioners, but they may serve no more than two full terms. Id. § 992(a) & (b). The President also has the power to remove the Commissioners for "neglect of duty or malfeasance in office or for other good cause shown." Id. § 991(a).

The Sentencing Reform Act mandates that three of the Commissioners must be Article III judges who are selected from a list of six judges furnished by the Judicial Conference of the United States. Id. § 991(a). The judicial members are not required to resign as federal judges, and thus far all of the judicial members have continued to sit on cases, albeit on a reduced caseload basis, while serving as Commissioners. The Act also designates the Sentencing Commission as "an independent commission in the judicial branch of the United States." Id. §

991(a).

The Commission's principal duty is to issue sentencing guidelines, or, as the Commission has described it, "to establish sentencing policies and practices for the federal criminal justice system" Revised Draft Sentencing Guidelines at 1 (January 1987); 28 U.S.C. § 991(b). Although the Commission is required to submit its guidelines to Congress six months before they go into effect, see Pub. L. No. 98-473, § 235(a)(1)(B)(ii) (I) & (III), affirmative congressional approval is not necessary. To the contrary, Congress can prevent guidelines from going into effect only by passing a law, which requires approval of both Houses and the President, or two-thirds of each House if the President chooses to veto that law.

Another critical feature of the guidelines is that they are not merely advisory, but are essentially mandatory. This is most apparent from 18 U.S.C. § 3553(b), which directs judges to sentence all individuals convicted of crimes that took place after November 1, 1987, under the guidelines. In order to further confine the discretion of sentencing judges, Congress allowed judges to depart from the guidelines only when the case presents aggravating or mitigating factors which the Commission did not adequately take into account in formulating the particular guideline under which the defendant is being sentenced. Id. Furthermore, Congress gave both the defendant and the government a right of appeal based on the claim that the guidelines were incorrectly applied or that a departure from them

was unreasonable. 18 U.S.C. § 3742(a) and (b).

Another important aspect of this new sentencing reform system is that the sentence imposed will be the sentence actually served. Thus, Congress abolished parole so that sentencing judges rather than the Parole Commission will fix the time to be served, and it sharply curtailed the prior reductions for good time by limiting the maximum reduction for good time to 54 days per year. See 18 U.S.C. § 3624(b); Pub. L. No. 98-473, § 218(a)(4) & (5) (repealing old provisions).

Following the completion of an extensive rule-making proceeding, the Commission, by a vote of 6 to 1, issued final guidelines on April 13, 1987, and submitted them to Congress for the statutory six-month period. When Congress took no action to adopt the guidelines or to delay their effective date, they became effective on November 1, 1987, for crimes committed on or after that date.

2. The Proceedings In This Case.

Petitioner was indicted on three counts arising out of a December 3, 1987 sale of cocaine. App. 16a-18a. On February 3, 1988, petitioner pled guilty to conspiracy to distribute cocaine, the first count of the indictment. The government then dismissed the other two counts, and the parties entered into a stipulation regarding the factors to be considered by the Court in imposing sentence. App. 21a-22a.

On March 25, 1988, the United States District Court for the Western District of Missouri heard consolidated motions by

several defendants, including petitioner, challenging the constitutionality of the sentencing guidelines on separation of powers and excessive delegation grounds. On April 1, 1988, the court denied those motions in a decision reproduced at App. 1a-6a.

At the sentencing hearing held on April 15, 1988, petitioner moved to have the guidelines declared invalid under the Due Process Clause on the ground that they prevented the court from considering relevant factors in sentencing. App. 26a-27a. The court denied the motion, concluding that "I am not aware of any factor that is not available to me to consider that would have made some difference favorable to the defendant if I had had it to consider." App. 28a. Accordingly, no due process issue is presented in this petition.

At the conclusion of the hearing, the court sentenced petitioner under the sentencing guidelines to an 18-month term of imprisonment, to be followed by a three-year term of supervised release. App. 30a. The court also imposed a \$1000 fine, thereby departing below the fine amount set forth in the guidelines because of petitioner's limited earning capacity, and imposed a special assessment of \$50. App. 30a-31a.

REASONS FOR GRANTING THE PETITION

In his petition, the Solicitor General focused on the impact on the Department of Justice and the federal courts of the uncertainty over the constitutionality of the sentencing guidelines. We fully agree that the reasons given by the

Solicitor General warrant granting certiorari before judgment, and we wish only to add two points from the defense perspective. These views are based not solely on this case, but also on a number of other cases in which undersigned counsel have represented defendants in similar challenges to the sentencing guidelines, and from their regular communications with public defenders and other defense counsel in numerous cases regarding these issues. Thus, the unanimous defense counsel view is that it is vital that this Court immediately resolve the questions presented in this petition.¹

1. Prior to the effective date of the sentencing guidelines, more than 90% of federal defendants pled guilty. A key element in deciding on whether to plead is the likely sentence to be imposed. One of the purposes of the sentencing guidelines is to increase certainty in sentencing, but that goal is wholly thwarted now because of the uncertainty of the status of the guidelines themselves. Thus, defendants cannot intelligently decide whether to plead guilty unless they know whether the guidelines or the pre-guidelines system applies.

In order to advise their clients as best as they can in this state of uncertainty, defense counsel must spend substantial resources investigating and calculating the potential sentences under both the guidelines and the pre-guidelines system. Only with this information in hand can defendants and their counsel

¹According to our best estimate, 90 judges have ruled on the constitutionality of the sentencing guidelines with 59 judges declaring them unconstitutional and 31 upholding them.

plan their strategy. Yet this substantial duplication of effort on the sentencing issue has greatly increased the pre-trial workload of defense counsel, and similar increases will result from the inevitable resentencings and possible retrials that will follow the final resolution of this issue. Thus, this is a situation in which it is vital to know, as soon as possible, the answers to these fundamental questions in order for defense counsel to advise their clients, and for defendants to be able to make intelligent choices about how to plead and otherwise conduct their defenses.

2. If the Court agrees with petitioner that there are constitutional defects in the Sentencing Reform Act, the Court must then deal with severability. Some severability issues are closely-tied to the merits, i.e., is there any way in which the offending portions of the statute can be severed in order to save most of the scheme as Congress wrote it? Included in that category are claims that (a) the constitutional defects can be cured by making the guidelines advisory rather than mandatory, (b) the composition of the Commission, which includes three judges and four non-judges, can be restructured to eliminate the inclusion of persons not entitled to participate in the issuance of sentencing guidelines (either the judges or the non-judges), (c) the assignment of the Sentencing Commission to "the Judicial Branch" can be severed, and (d) the provisions for presidential removal and reappointment of Commission members can be severed.

If the Court concludes that none of those attempts to save

the guidelines is successful, we urge the Court to resolve the issues of the severability of the abolition of the prior parole system and the sharp reduction in good time credits. Under pre-November 1987 law, parole was generally available after a prisoner had served one-third of the sentence imposed, see 18 U.S.C. §§ 4205-4206, but for sentences issued under the guidelines, there is no parole. There can be no doubt that it is essential for sentencing judges, prison officials, defense counsel and defendants, not to mention the Parole Commission itself, to know whether parole applies to post-November offenses if the guidelines are declared unconstitutional. Similarly, the Court should also decide whether the newly created category of supervised release, 18 U.S.C. § 3583, which is analogous in several respects to parole, applies if the guidelines are unconstitutional.

The other major element in the 1984 sentencing reform is the substantial reduction in the availability of good time. The old system, which was extraordinarily complex and uncertain for the prisoner, allowed significant reductions in time served for good behavior and work credit. 18 U.S.C. §§ 4161-4162. Under the new system, less good time is available, but its accumulation is far more predictable. 18 U.S.C. § 3624(b). In short, the two systems lead to entirely different terms of imprisonment, but no one knows which system applies. Indeed, for shorter sentences, it is particularly important to know which good time rules control since application of the wrong rules will often result in

either an unjustified delay in release, or an early release not authorized by law. And, just as in the case of parole, everyone in the criminal justice system must know, as soon as possible, whether the new or old good time rules apply, so that the system can function properly.

In petitioner's view, Congress would not have abolished parole or reduced good time credits without adopting the sentencing guidelines because, as the Act and its legislative history make abundantly clear, the sentencing guidelines, abolition of parole, and sharp reduction in good time were all part of a single determinate sentencing package of which the sentencing guidelines were the core. However, at this stage, the only question is whether the Court should decide the severability of the parole and good time changes in this proceeding, and on that question, all of the arguments point toward an immediate resolution. Thus, until that severability question is finally resolved, there will be at least as much, if not more, uncertainty in the federal criminal justice system as there is over the constitutionality of the guidelines themselves. Judges will have to guess how to sentence defendants in order to assure that what they consider to be the proper sentence is actually served, and the Bureau of Prisons will not know when prisoners are eligible for release. In order to prevent mass confusion and a flood of federal habeas corpus petitions raising parole and good time claims, this Court should address the severability question in this proceeding.

CONCLUSION

For the reasons set forth above, and in the petition filed by the United States, it is respectfully submitted that the petitions for a writ of certiorari before judgment in both cases should be granted.

Respectfully submitted,

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Supreme Court, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, *Petitioner*,

v.

JOHN M. MISTRETTA, *Respondent*.

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UNITED STATES OF AMERICA, *Respondent*.

On Writs Of Certiorari Before Judgment
To The United States Court Of Appeals
For The Eighth Circuit

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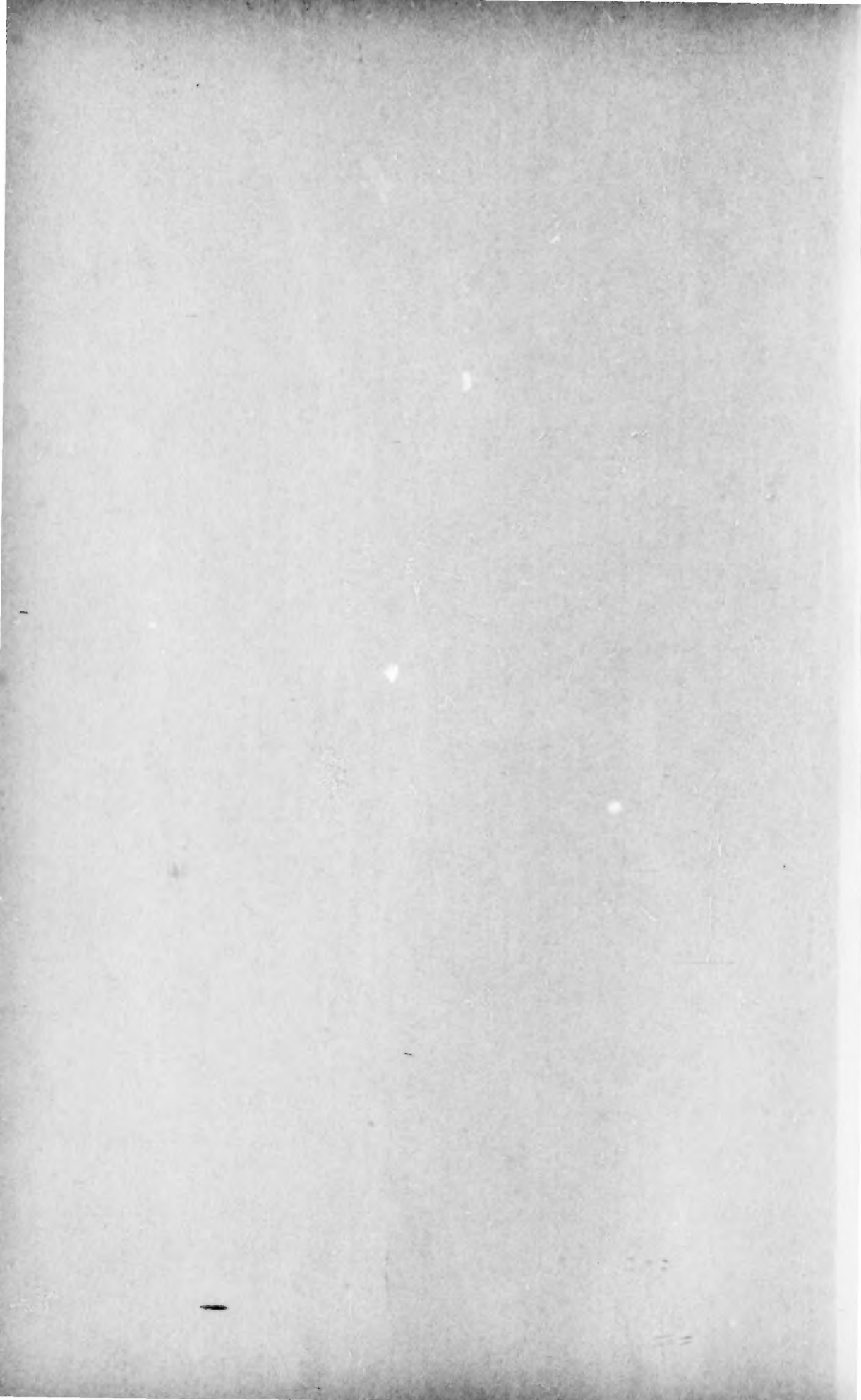
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QUESTIONS PRESENTED*

1. Did Congress violate principles of separation of powers when it assigned to the Sentencing Commission, a body within the Judicial Branch, three of whose seven voting members must be Article III judges, the power to issue substantive, binding sentencing guidelines for federal crimes?

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3. When Congress enacted a new determinate sentencing system in the Sentencing Reform Act, would it have intended to abolish parole and substantially restructure good behavior adjustments if the sentencing guidelines, which form the core of the new system, were found unconstitutional and hence unenforceable?

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OPINION AND JUDGMENT BELOW

The opinion of the district court on the constitutional question is reported as *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988). It is included in the Appendix to the petition for a writ of certiorari filed by the United States (No. 87-1904) at App. 1a-15a.

STATEMENT OF JURISDICTION

The notice of appeal to the Eighth Circuit was filed on April 19, 1988, App. 41a-44a, and the case was docketed in the court of appeals on April 22, 1988. App. 45a-46a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), as amended, are reproduced in the petition filed by the United States, at App. 47a-85a, including the transition provisions which appear at App. 80a-84a. For the convenience of the Court, we are providing copies of the final guidelines for each Justice and lodging with the Clerk a copy of the final guidelines as well as a copy of the two earlier drafts, one dated September 1986 (the "Preliminary Draft") and the other dated January 1987 (the "Revised Draft"), both of which were also before the district court.

STATEMENT OF THE CASE

Petitioner was indicted on three counts arising out of a December 3, 1987 sale of cocaine. App. 16a-18a. On February 3, 1988, petitioner pled guilty to conspiracy to distribute cocaine, the first count of the indictment. The government then dismissed the other two counts, and the parties entered into a stipulation regarding the factors to be considered by the Court in imposing sentence, which resulted in a 15-21 month range under the guidelines. App. 21a-22a.

On March 25, 1988, the United States District Court for the Western District of Missouri heard consolidated motions by several defendants, including petitioner, challenging the constitutionality of the sentencing guidelines on separation of powers and excessive delegation grounds. On April 1, 1988, the court denied those motions in a decision reported at 682 F. Supp. 1033 (App. 1a-6a). Thereafter, the court sentenced petitioner under the sentencing guidelines to an 18-month term of imprisonment, to be followed by a three-year term of supervised release. App. 30a. It also imposed a \$1000 fine and a special assessment of \$50. App. 30a-31a. The government and defendant filed cross-petitions for writs of certiorari before judgment, which this Court granted on June 13, 1988.¹

In this Court, defendant alleges that the sentencing guidelines issued by the United States Sentencing Commission (the "Sentencing Commission"/"Commission") violate the Constitution in two separate, but related ways. First, they violate separation of powers principles because Congress may not assign the power to issue substantive sentencing guidelines to a body which, by statute, is part of the Judicial Branch of government and which has among its members three federal judges. *See infra* at 15-30. Moreover, even if the delegation could be made to a body within the Judicial Branch composed entirely of independent Article III judges, the Sentencing Commission is not so constituted because its members include a majority of non-judges, and because the President, the head of the Executive Branch, retains substantial control over the Commission through his ability to grant or deny reappoint-

¹ At the sentencing hearing held on April 15, 1988, petitioner moved to have the guidelines declared invalid under the Due Process Clause on the ground that they prevented the court from considering relevant factors in sentencing. App. 26a-27a. The court denied the motion, concluding that "I am not aware of any factor that is not available to me to consider that would have made some difference favorable to the defendant if I had had it to consider." App. 28a. Accordingly, no due process issue is presented in these petitions.

ment to its members and his power to remove them for cause. *See infra* at 30-35. Second, the delegation to the Sentencing Commission of the authority to establish sentencing guidelines is excessive because Congress failed to make the necessary policy judgments and gave the Commission insufficient standards to guide its work. *See infra* at 47-54. In order to establish the basis for these constitutional defects, and to understand why the abolition of parole and the major changes in good time were not intended to exist apart from the guidelines (pp. 54-60), it is necessary to review the composition of the Sentencing Commission, its statutory mandate, and the actions it has taken.

A. The Sentencing Commission.

Title II of the Comprehensive Crime Control Act of 1984, known as the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, effected a major revolution in sentencing in the federal courts by establishing a determinate sentencing system. The Act did this through several interrelated reforms, namely, the creation of essentially mandatory sentencing guidelines that control judges' discretion in sentencing defendants, the abolition of parole, and the adoption of more limited and more predictable rules governing the availability of good behavior reductions in sentences. A major aim of the law is to eliminate unwarranted disparities in sentencing, both by ensuring, insofar as practicable, that similarly situated individuals convicted of the same crime receive the same sentence, and by ensuring that similar crimes are treated similarly for sentencing purposes, even though the violations are of different provisions of the United States Criminal Code.²

² The Act was attached to the continuing resolution that funded nine major parts of the federal government for Fiscal Year 1985. *See* Title I of Pub. L. No. 98-473. Most of the sentencing provisions come from the Senate's bill, S. 1762, which the Senate approved on February 2, 1984, and which is fully described in S. Rep. No. 98-225, 98th Cong., 1st Sess. (1983) ("S. Rep."), reprinted in 1984 U.S. Code Cong. & Ad. News 3182 ("1984 USCCAN").

Congress could have done what it has previously done and revised the sentencing laws itself. Instead, it chose to delegate the very broad power to make these changes to the Sentencing Commission. Not surprisingly, Congress faced major disputes over the method by which the Commission would be appointed. The House Judiciary Committee voted to place the Commission in the Judicial Branch and to have the Judicial Conference of the United States appoint the Commissioners, a majority of whom would be federal judges. *See* H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. 14 (1984) (§ 3794). The Senate, joined by the Administration, wanted the President to have the power to appoint the Commission's members, two of whom would be federal judges. *See* S. Rep. at 159-60; 1984 USCCAN at 3342-43.

To resolve the dispute, Congress, in essence, split the seven member Commission into two parts. *See* H.R. Conf. Rep. No. 98-1159, 98th Cong., 2d Sess. 415 (1984) (amendment no. 131); 1984 USCCAN at 3711. Under the compromise, Congress placed the Commission in the Judicial Branch, and the President was directed to appoint three federal judges to the Commission from a list of six judges furnished by the Judicial Conference. 28 U.S.C. § 991(a). Although the Commissioners serve on a full-time basis until six years after the guidelines become effective, the judicial members are not required to resign as federal judges while on the Commission. *Id.* § 992(c). In fact, during the time that the guidelines were being drafted, all of the judicial members of the Commission continued to sit on cases, albeit on a reduced caseload basis. Originally, all of the judges had to be active judges, but, after then-Chief Justice Warren Burger protested, Congress allowed senior judges to be Commission members. Pub. L. No. 99-22, 99 Stat. 46 (1985).

The other four members of the Commission who may, but need not be, federal judges, are also appointed by the President. 28 U.S.C. § 991(a). In addition, the Attorney General (or his designee) is a permanent non-voting member of the Com-

mission, *id.*, and the Chairman of the Parole Commission served as a non-voting Commission member when the guidelines were being prepared and will remain on the Commission during the first five years after they became effective. Pub. L. No. 98-473, § 235(b)(5) (App. 82a-83a). All of the voting members, including the President's choice of a chairman, must be confirmed by the Senate, and no more than four may be members of the same political party. 28 U.S.C. § 991(a). Commission members serve six-year terms, which are staggered beginning November 1, 1987, and they may be reappointed, but may serve no more than two full terms. 28 U.S.C. § 992(a) & (b); Pub. L. No. 98-473, § 235(a)(2) (App. 81a). Finally, the President may remove members of the Commission for "neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a).

B. The Commission's Mandate.

The Commission's principal mandate is to issue sentencing guidelines, or, as the Commission described it, "to establish sentencing policies and practices for the federal criminal justice system. . . ." Revised Draft, p. 1 (Jan. 1987); *see also* S. Rep. at 161; 1984 USCCAN at 3344. An affirmative vote of four of the seven Commission members is needed to approve the guidelines. 28 U.S.C. § 994(a). Although the Commission is required to submit the guidelines to Congress six months before they go into effect, *see* Pub. L. No. 98-473, § 235(a)(1)(B) (ii) (App. 80a), congressional approval is not required. Thus, Congress can prevent them from going into effect only by passing another law, requiring approval of two Houses plus the President, or two-thirds of each House if the President exercises his veto power.

Another critical feature of the guidelines is that they are not merely advice that sentencing judges may freely disregard. Thus, under 18 U.S.C. § 3553(b), sentencing courts must impose sentences in accordance with the applicable sentencing guideline. In order to further confine the discretion of sentencing judges, Congress provided that each guideline may have a

maximum differential in prison terms of no more than six months or 25%, whichever is greater. 28 U.S.C. § 994(b)(2). In addition, the sentencing judge must explain the reasons for imposing a particular sentence, if the guidelines have a range that exceeds 24 months or if the judge sentences outside the guideline range. 18 U.S.C. § 3553(c). However, Congress made it clear that departures from the guidelines are to be the exception, *i.e.*, they are allowed only when the case presents factors which the Commission did not adequately take into account in formulating the guidelines. 18 U.S.C. § 3553(b); Pub. L. No. 100-182, § 3, 101 Stat. 1266 (1987).

In order to make this direction more than hortatory, Congress gave both the defendant and the United States a right of appeal if the sentence is imposed in violation of law, or if there is an improper application of the guidelines. 18 U.S.C. § 3742. In addition, if a judge gives a sentence greater than authorized by the applicable guideline, the defendant has a right of appeal, and the appeals court will review the sentence to see whether it is "unreasonable" in light of the factors considered and the reasons given by the trial judge. *Id.* § 3742(a)(3) & (d)(3). Similarly, a sentence less than the applicable guideline is judicially reviewable on appeal by the government under the same standard. *Id.* § 3742(b)(3) & (d)(3). Thus, while the guidelines are not legally binding in the sense that the judge has no choice but to sentence a defendant under them, they are intended to have the force and effect of law, with deviations allowed in relatively narrow circumstances.

Another central element of this sentencing package is that the sentences served will be the sentences imposed. Thus, Congress abolished parole so that trial judges rather than the Parole Commission will fix the time in prison. *See* 18 U.S.C. § 3624(a); S. Rep. at 115; 1984 USCCAN 3298. In addition, Congress also provided that the maximum reduction for good time will be 54 days per year and that no reduction shall be allowed for any term of less than one year. *See* 18 U.S.C.

§ 3624(b); compare 18 U.S.C. § 4161 (1982) (repealed by Sentencing Reform Act).³

While Congress gave a number of directions to the Sentencing Commission, the sum of its guidance for establishing a coherent, workable system of sentencing guidelines is quite small. Thus, the Commission is directed to ensure certainty and fairness and to end unwarranted sentencing disparities, while at the same time maintaining sufficient flexibility to take into account individual circumstances. 28 U.S.C. § 991(b)(1)(B). However, as the Commission itself recognized, there is an inherent tension between the goals of "uniformity" and "proportionality" which makes it difficult to achieve them both. (Guidelines, p. 1.2)

Congress directed the Commission to base its guideline system on both the characteristics of the offense and the offender's personal character and criminal history. With respect to the categories of offenses, Congress listed seven broad factors, but gave the Commission the authority to determine the relevance, if any, of all of them. 28 U.S.C. § 994(c). Similarly, Congress gave the Commission a list of eleven offender characteristics in 28 U.S.C. § 994(d) and told the Commission to make the same relevancy determination, although Congress indicated that that consideration of several of them would generally be inappropriate. *Id.* § 994(e).

Congress also told the Commission to ascertain the average of past sentences, but it made it clear that it did not want the Commission to be bound by those averages. *Id.* § 994(m). It

³ Besides abolishing parole for those sentenced under the guidelines, Congress also abolished the Parole Commission five years from the effective date of the Act. Pub. L. No. 98-473, § 235(b)(1)(C) (App. 81a). Congress also directed the Parole Commission to set future release dates for all prisoners who are incarcerated under the old law, but who will not be released by the time that the Parole Commission is abolished. *Id.* § 235(b)(3) (App. 82a).

also gave the Commission free reign in deciding how to handle such vital matters as the availability of probation, whether fines as well as prison terms should be imposed, and if so, in what amounts, and whether sentences for multiple convictions should run concurrently or consecutively. *Id.* § 994(a)(1). In addition, Congress gave the Commission a number of other directions, dealing mainly with narrow problems of sentencing, but otherwise it left the Commission with unbridled discretion to establish whatever sentencing rules and policies it thought appropriate within the statutory limits for the particular crime. As the Senate Report described it, Congress was “delegating some of its authority [to the Commission] to set sentencing policy.” S. Rep. at 64; 1984 USCCAN at 3247.⁴

C. What the Commission Did.

The 12-page introduction to the final guidelines provides a useful summary of where the Commission started, what it went through, and what it did. Acting in a manner similar to that of a traditional executive agency, as Congress directed it to do, *see* 28 U.S.C. § 994(x), the Commission embarked on notice and comment rulemaking, involving several rounds of comments and multiple drafts. The earlier drafts reflect the open-ended nature of the Commission’s inquiry, which involved what the Preliminary Draft called (at ii) “a series of difficult policy issues that remain unresolved.” Indeed, as the Commission acknowledged, the “process has required [it] to resolve a host of important policy questions,” Guidelines, p. 1.5, due to the need to fill in the gaps in the very broad congressional mandate.

In the end, by a vote of 6 to 1, with all three judges voting “yes,” the Commission issued guidelines that it estimates will cover 90% of all criminal cases. Guidelines, p. 1.12. Under the

⁴ The Commission is also required to monitor the operation of the guidelines and amend and supplement them when necessary. 28 U.S.C. §§ 994(o) & (p); Pub. L. No. 100-182, *supra*, § 21 (App. 84a-85a).

guidelines, the sentence for each case is determined after calculating the seriousness of the offense and the criminal history of the offender in the manner that the Commission has directed.

In developing the ranking for the seriousness of each offense, the Commission grouped together what it considered to be similar crimes, such as property crimes or crimes against the person. Guidelines, ch.2, pts. A-T. It assigned each specific type of crime, such as theft or murder, a base level from 1 to 43, which translate into ascending terms of imprisonment. Thus, each base level includes a number of different crimes from various portions of the U.S. Code, which the Commission has determined to be of the same relative seriousness.

In setting the base offense level for each type of crime, the Commission started by estimating actual past sentences, and then, when it believed that the prior sentences were not sufficiently severe (or were too severe) according to the Commission's own views of the seriousness of the crime, it increased (or decreased) the base offense level to what it thought was proper. *See, e.g.*, Guidelines, p. 2.31 ("current sentencing practices do not adequately reflect the seriousness of public corruption offenses.") The result of the process is a table of base offense levels in which the Commission ranked crimes according to its view of their seriousness, with the greatest upward changes from prior practices in white collar crimes, including public corruption, tax evasion, and antitrust violations.

The Commission also concluded that the general base level punishment for a given type of crime would often not be appropriate for the particular violation. Accordingly, it included mitigating and aggravating factors that the sentencing judge must take into account for most offenses. For some offenses, such as robbery, a number of factors must be considered. *See* Guidelines, § 2.B3.1. Others, such as theft or tax evasion, are not complex, but depend in large part on the amount of money stolen or tax evaded. *See* § 2B1.1(b)(1) (Larceny Table) and § 2T4.1 (Tax Table). In some of the tables, the ranges are small

and multiple gradations are used; in others, the ranges are large and only a few separate gradations are employed. *Compare* Drug Quantity Table (Guidelines, pp. 2.38-39), *with* Robbery Table (*id.*, p. 2.21). In all cases, the Commission, on its own, decided whether to utilize monetary measures or other types of adjustments (*e.g.*, amounts of drugs), and, if so, what sort of ranges and gradations to use.

The Commission also provided for several other types of adjustments. Some were added for purely policy reasons, such as the upward adjustment for fraud committed on a religious, charitable, or governmental body, which was included because the Commission believed that such crimes "create particular social harm." Guidelines, p. 2.70. *See also* Revised Draft, p. 27 ("Public policy considerations compel additional punishment [beyond their actual monetary value] for theft of drugs, firearms, and destructive devices . . .") The Guidelines also allow for an increase of two in the base offense level if the accused attempts to interfere with the investigation, even though he or she is not charged with obstruction of justice, perjury, or other similar offenses. *Id.* § 3C1.1.

The final offense-related adjustment is based on the defendant's acceptance of responsibility for his or her actions. Although the Commission had previously asked for comments on whether to include an automatic reduction for guilty pleas, Preliminary Draft, pp. 123-25, the final guidelines make it clear that judges do not have the authority to make a reduction simply for pleading guilty. Guidelines, pp. 3.21-.22 & n.3. Nor, on the other hand, is one who refuses to plead guilty, and is later convicted, automatically to be denied a reduction for acceptance of responsibility, if responsibility is accepted prior to sentencing. *Id.*, pp. 3.21-.22 & n.2.

The other major element of the sentencing decision for which the Commission had to prescribe rules is which characteristics of the defendant, including any prior criminal record, should be taken into account. Although the Commission was instructed to consider a number of factors regarding offender charac-

teristics, *see* 28 U.S.C. § 994(d), it chose to include only criminal sentences previously imposed. Guidelines, p. 4.1. The Commission specifically excluded such factors as age, drug and other substance abuse, and mental condition as a basis for calculating the appropriate guideline. *Id.* As a result, the Commission devised six criminal history categories, which, together with the 43 offense levels, are set forth in the sentencing table, which is essentially a two dimensional grid, appearing at page 5.2 of the Guidelines.

The sentencing range for each defendant is determined by the intersection of the offense level and the criminal history category. Judges have the power to depart from that range only if the Commission has not adequately taken a factor into account in setting the guidelines. 18 U.S.C. § 3553(b). However, in that event, the judicial review provisions described above would then be available to the defendant or the government. Thus, as the Commission recognized, "despite the courts' legal freedom to depart from the guidelines, they will not do so very often." Guidelines, p. 1.7.

The Commission made several other important policy decisions in the guidelines. First, in addition to any imprisonment or probation imposed, everyone found guilty of a federal crime who is not indigent must pay a fine, in the amount contained on the schedule created by the Commission. *See id.*, § 5E4.2. *See also* Preliminary Draft, pp. 157-61 (debate about the proper approach to fines).

Second, there will be a dramatic increase in the number of people who will spend some time in confinement because the Commission has authorized straight probation only in those cases in which the guidelines produce a minimum sentence of zero months. Guidelines, § 5C2.1(b). In particular, it made the policy judgment that straight probation had been given to an "inappropriately high percentage of offenders guilty of certain economic crimes. . . ." *Id.*, p. 1.8. As a result, if a crime for a first offender allows a sentence of at least one, but not more than six months, it must include some confinement, either

intermittent or community, in an amount equal to at least the amount of the minimum sentence. *Id.* § 5C2.1(c).⁵ Where the minimum sentence is between six and ten months, the judge is required to sentence the individual to at least one-half of the minimum term in prison. *Id.* § 5C2.1(d). And for all offenses with a minimum range of more than ten months, imprisonment is mandatory for the entire minimum term of the sentence, subject only to the minimum good time reductions. *Id.* § 5C2.1(f).

Although the Commission recognized that its entire sentencing system could be undermined by the process of plea bargaining, which previously disposed of 90% of the cases, *see* Guidelines, p. 1.8, it decided not to make any major changes in that part of the process. *Id.* Instead, the Commission added to existing Federal Rule of Criminal Procedure 11(e) a system that would give the sentencing judge sufficient information and a proper framework, in the form of guidelines, for determining whether to accept a plea bargain, and then to give the defendant the right to withdraw a guilty plea in certain circumstances if the judge did not approve the bargain. *Id.* §§ 6B1.1-6B1.4. The Guidelines make clear that the court is not bound by the plea agreement or even by a stipulation of facts regarding the circumstances of the crime, but must await the presentence report before finally accepting a plea. *Id.* §§ 6B1.1(c) & 6B1.4(d). And even with a plea bargain, the judge may only impose a sentence that falls outside the applicable sentencing range for the same reasons that would justify such a departure for those found guilty after trial.

SUMMARY OF ARGUMENT

1. The extraordinary blending of executive, legislative, and judicial functions in the Commission has produced a truly

⁵ Under intermittent confinement, the individual may work in the community during the day, but must return to jail or prison during all remaining hours. Guidelines, p. 5.12. Community confinement is similar, but is served in a community treatment center, halfway house, or similar residential facility. *Id.*

unique situation. Although the Sentencing Commission and the Justice Department both purport to defend the constitutionality of the guidelines, their arguments on the separation of powers issue directly contradict each other, a phenomenon which visibly demonstrates the fundamental flaws in the Sentencing Commission that doom its fate.

The Commission seeks to defend the statute as written by arguing that the broad, substantive powers assigned to it are consistent with what even it admits are the limitations on the functions that may be performed by the Judicial Branch. And it argues that the presence of non-judges and the removal and reappointment powers of the President over the Commission do not involve an improper outside interference with its operation, notwithstanding this Court's ruling in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

The Justice Department, on the other hand, contends that the duties assigned to the Commission cannot constitutionally be delegated to a body in the Judicial Branch, but must be given to an Executive Branch agency. But instead of contending that the law is unconstitutional because an executive function has been invaded, as it did in *Bowsher*, *Morrison v. Olson*, ___ U.S. ___, 56 U.S.L.W. 4835 (1988), and *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), it has asked the courts to rewrite the law and reassign the Commission from the Judicial to the Executive Branch. This unprecedented and unjustifiable request dramatically underlines the weakness in the Justice Department's defense of the guidelines.

Ordinarily, even the extraordinary sharing of power found in the Commission would be entitled to a presumption of constitutionality on the theory that Members of Congress are also sworn to uphold the Constitution, and their judgment on constitutional questions should not be lightly set aside. But here, despite the lengthy consideration that sentencing reform received, there is not a word in the committee reports or the floor debates concerning the Sentencing Reform Act of 1984

indicating that anyone in the Legislative or Executive Branches was aware that the composition of the Commission and the functions assigned to it presented serious separation of powers problems. While there were isolated references to other constitutional issues in the hearings that began in 1977, no one in Congress questioned whether the issuing of sentencing rules could constitutionally be undertaken by this kind of Commission, located in the Judicial Branch. Thus, there is no basis to defer to Congress' judgment, and the Court should consider the issues *de novo*.

2. In establishing the Commission, Congress commingled the branches of government in blatant violation of principles of separation of powers. First, Congress made the Commission part of the Judicial Branch and required that three federal judges serve on it. At the same time, however, Congress assigned the Commission the job of writing binding rules that will govern sentencing for federal crimes. Because the functions properly performed by the Judicial Branch are quite narrow and do not extend to substantive lawmaking, the guidelines are unconstitutional.

Second, even if a judicial body could issue sentencing guidelines, the Commission is not an appropriate judicial body to perform the task for two reasons. First, the President has too much control over the Commission members through his reappointment and removal powers, and second only a minority of Commission members are federal judges. Thus, the independence of the Judicial Branch is threatened because of the presence of presidential control of the kind forbidden by *Bowsher*, and because of the "sharing" of judicial power with persons who are not Article III judges, and who lack the protections of life and tenure and the guarantee against reduction in salary, of the kind condemned in *United States v. Nixon*, 418 U.S. 683, 704 (1974), and *INS v. Chadha*, *supra*, 462 U.S. at 958.

Third, assuming Congress could have delegated the guideline writing function to an Executive Branch body, the

Commission cannot be saved by a judicial reassignment of it to that branch because Congress deliberately chose to put the Commission in the Judicial Branch. But even if Congress had placed it in the Executive Branch, separation of powers principles would still be violated because federal judges cannot constitutionally serve on a substantive rulemaking body, whether located in the Judicial or Executive Branch of government.

The guidelines are also unconstitutional because Congress delegated too much power to make fundamental policy decisions to the Commission. Congress assigned the Commission the task of writing federal sentencing law, yet it failed to make the hard policy choices itself, and thus did not give the Commission sufficient direction to guide it in carrying out this law-making task.

If the guidelines are unconstitutional, then other portions of the Sentencing Reform Act, principally the abolition of parole and the substantial restructuring of good time credits, must also be set aside because they are not severable from the guidelines. The power to issue sentencing guidelines is the core of a new determinate sentencing scheme, and the structure of the Act and its legislative history make it clear that Congress would not have enacted other lesser aspects of that scheme without the guidelines. Thus, Congress enacted a sentencing reform package to create a new system of determinate sentencing, and there is no basis to believe that it would have enacted either the abolition of parole or the new good time rules without the core element of the package—the guidelines.

ARGUMENT

I. THE COMMISSION VIOLATES SEPARATION OF POWERS PRINCIPLES.

A. The Commission Cannot Constitutionally Issue Sentencing Guidelines Because It is a Part of the Judicial Branch and Its Members Include Article III Judges.

The Sentencing Commission was given the task of issuing substantive sentencing guidelines that have the force and

effect of law, yet the statute creating the Commission assigns it to the Judicial, not Executive, Branch of government, and requires it to have at least three Article III judges as members. Under basic principles of separation of powers, as most recently construed and applied to the Judicial Branch in Part IV of *Morrison v. Olson*, ___ U.S. ___, 56 U.S.L.W. 4835 (1988), the broad policymaking functions assigned to the Commission may not properly be assigned to a body within the Judicial Branch.

Before examining *Morrison*, there are a number of earlier rulings of this Court that also support our separation of powers claim. For example, in *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928), the Court observed that it

may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.

These principles were discussed at considerable length in *Buckley v. Valeo*, 424 U.S. 1, 120-22 (1976), where the Court stated that the three branches shall be largely, but not totally, separate from one another and that the system of separation of powers, together with its correlative checks and balances, was intended to safeguard against the encroachment or aggrandizement of one branch at the expense of another. And in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), the Court observed: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." The Court further noted that, when the Framers intended to allow one branch to undertake an activity outside of its ordinary

functions, it made explicit provision for it in the Constitution. *Id.* at 955.

The function of the Judicial Branch is embodied in Article III, and it is basically confined to deciding "cases" or "controversies," as those terms have been historically understood, *i.e.*, to resolve real disputes between adverse parties. See *Muskrat v. United States*, 219 U.S. 346, 356 (1911). Thus, when, at President Washington's direction, then-Secretary of State Thomas Jefferson asked this Court for an advisory opinion on the construction of certain laws and treaties, the Court refused to provide it, because that function is for the Executive and not the Judicial Branch. *Id.* at 354. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) ("Even as to questions that were the staple of judicial business, it is not for the court to pass upon them unless they are indispensably involved in a conventional litigation.")

Similarly, the Court has refused to allow Article III judges to pass on claims where the determinations would not be final, but would be reviewable by officials of the Executive Branch or by Congress. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); and the unreported opinion in *United States v. Todd*, (U.S. February 17, 1794), which is summarized and appears by order of the Court in an addendum to *Ferreira*, 54 U.S. 51. See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 538-41 (1962) (upholding Article III status of Claims Court and Court of Customs and Patent Appeals only by finding that non-Article III duties were extremely limited).

Other cases have produced analogous constructions and limitations on the powers of the Judicial Branch. In *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1505 (11th Cir.), *cert. denied*, 106 S. Ct. 3273 (1986), the court allowed a judicial investigation of the activities of Judge Alcee Hastings to continue over a separation of powers challenge, but did so only because the investigatory tasks at issue had "the

sole purpose of exploring complaints against federal judges and magistrates, with the ultimate aim of promoting 'the effective and expeditious administration of the business of the courts.'" It further found that "[f]unctions so limited in scope and purpose . . . do not fall outside the ambit of duties assignable to the members of the judicial rather than of another branch." *Id.* And in *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2131 (1987), the Court permitted a federal court to appoint an attorney to prosecute criminal contempt when the Justice Department would not, because to do so was "essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches."

Then in *Morrison v. Olson*, 56 U.S.L.W. 4835 (1988), this Court reaffirmed that Article III courts may perform functions beyond the adjudication of live cases and controversies only in rare and narrowly defined circumstances. Quoting *Buckley v. Valeo*, *supra*, 424 U.S. at 123, and discussing *Hayburn's Case* and *Ferreira*, the Court noted that "[a]s a general rule, we have broadly stated that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'" *Id.* at 4841 & n.15. This limitation on the scope of Article III "judicial power" serves a dual purpose: "to help ensure the independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for the other branches." *Id.* at 4842. The Constitution's separation of powers principle thus bars an Article III court from performing functions that either "pose[] any threat to the 'impartial and independent federal adjudication of claims,'" *Id.* at 4843, quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986), or "that are more properly accomplished by [the legislative or executive] branches." *Id.* at 4842.

In upholding the independent counsel provisions in *Morrison*, the Court first addressed the question of whether the Special Division usurped Executive Branch functions. The Court began by noting that the Division's authority to appoint

the independent counsel and to define her jurisdiction was based on the explicit constitutional authority in the Appointments Clause that allows courts to appoint inferior officers, Article II, § 2, cl. 2, not on Article III, although it also made it clear that the Division did not have “*unlimited* discretion to determine the independent counsel’s jurisdiction.” *Id.* at 4842 (emphasis in original). —

The Court then considered the host of “miscellaneous powers” that Congress vested in the Special Division, such as receiving the final report of the independent counsel, or granting extensions of time, or deciding whether to release a report. The Court found that these “passive” or “essentially ministerial” functions were “directly analogous to functions that federal judges performed in other contexts,” and were sufficiently close to traditional Article III functions to avoid “impermissibly trespass[ing] upon the authority of the Executive Branch.” *Id.*

Finally, the Court scrutinized the authority of the Special Division to terminate the office of the independent counsel, which it found was potentially “administrative” and therefore not “typically ‘judicial.’ . . .” *Id.* at 4843. Nevertheless, by construing this power narrowly, as “basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact,” the Court concluded that it did not pose a threat of judicial intrusion into the domain of the Executive Branch. *Id.*

Measured against the stringent standard expressed in *Morrison*, it is apparent that the powers of the Sentencing Commission go far beyond the constitutionally permissible scope of Article III activities. The establishment of comprehensive, binding sentencing guidelines is a very different function from imposing sentences in individual cases. Indeed, the intense dissatisfaction with the prior method of individual, discretionary sentencing led Congress to establish a whole new sentencing system. While Article III judges may surely impose individual sentences in cases before them, that power does not

equate with the power to establish sentencing rules that will bind all federal judges and all federal defendants, as the Commission has done here. As this Court has observed, it is "indisputable" that "the authority to define and fix the punishment for a crime is [a] legislative," not a judicial, task. *Ex Parte United States*, 242 U.S. 27, 42 (1916); see also *Rummel v. Estelle*, 445 U.S. 263, 283 (1980); *Gore v. United States*, 357 U.S. 386, 393 (1958). By performing this task, the Sentencing Commission has thus "impermissibly trespass[ed] upon the authority" of another branch. *Morrison*, 56 U.S.L.W. at 4842.

The Commission's own actions demonstrate how inappropriate it is for an unelected body in the Judicial Branch to carry out these functions. In essence, what the Commission has done is to take broad statutory statements, apply its judgments and views to them, and then translate them into a scheme which will be the law of sentencing for federal crimes. Probably the most significant choices that the Commission made, which are inherent in any system of guidelines, are the "policy decisions with respect to the relative severity of offenses and the appropriate level of punishment." Revised Draft, p. 7. An exhibit that was before the district court, and is an Addendum to this brief, lists the offenses according to levels of punishment assigned to them by the Commission, which reflects the Commission's judgment of the relative seriousness of each crime. Ordinarily, this equating of dissimilar acts is a legislative, or on occasion an executive, judgment, essentially embodying the community's values as to what kinds of sentences are appropriate for what kinds of crime, but here that function has been delegated to a body in the Judicial Branch.

The clear policy implications of the Commission's tasks can be seen by examining the Addendum. For example, at base offense level 18, the Commission grouped together the following disparate offenses: robbery below \$2500 (increasing to level 24 if over \$5,000,000); obstructing an election by force or threats; losing top secret national defense information; tampering with the public water system; and tax evasion over

\$5,000,000. Addendum at 6a-7a. Or, consider those at level 13: civil rights conspiracy; structuring transactions to evade reporting requirements (subject to a plus 18 adjustment); involving children under age 14 in drug trafficking; transporting sexually explicit material involving children under age 18 (with an adjustment of as much as plus 13); and possessing weapons or narcotics in prison. *Id.* at 8a-9a. And all of those in the latter group are one level above perjury, bribing a witness, and obstruction of justice, which many would consider to be at least as serious, yet the Commission decided otherwise. *Id.* at 9a-10a. Similarly, at level 9, a convicted bid rigger involving \$1-4 million in commerce would be treated the same as a person found guilty of passing a single counterfeit \$5 bill or a few dollars worth of phony food stamps. *Id.* at 11a. Similar policy-oriented, discretionary judgments are reflected in the Commission's decisions about when probation will be allowed, how to deal with cooperating (and obstructionist) defendants, what role fines should play in sentencing, and how to handle plea bargaining. Assuming that Congress can delegate this law-making function to another branch, it can only be delegated to the Executive Branch, not the Judicial Branch, because it is precisely the same kind of function—"[i]nterpreting a law enacted by Congress to implement the legislative mandate"—that the Supreme Court found in *Bowsher v. Synar*, 106 S. Ct. 3181, 3192 (1986), to be "the very essence of 'execution' of the law." Indeed, merely to state what the Commission is doing is to underscore how far adrift this function is from traditional Article III responsibilities under our system of separation of powers.

As noted above, principles of separation of powers limit judges from deciding matters except when they present direct cases or controversies. Thus, in the standing context, such limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Under those principles, the judiciary is equally precluded from establishing binding sentencing guidelines in a rulemaking proceeding without even a

semblance of a lawsuit. Similarly, among the reasons why the Court has declined to address certain claims on political question grounds—the “lack of judicially discoverable and manageable standards for resolving [them] or the impossibility of deciding [them] without an initial policy determination of a kind clearly for nonjudicial discretion,” *Baker v. Carr*, 369 U.S. 186, 217 (1962)—apply fully to the kinds of issues that the Commission had to decide in issuing sentencing guidelines.

The Sentencing Commission has responded by analogizing its binding sentencing guidelines to the Federal Rules of Civil Procedure, but that comparison ignores several fundamental differences between the two types of rules. First, the judiciary is authorized to issue only procedural rules. Thus, the Rules Enabling Act specifically provides that the rules “shall not abridge, enlarge or modify any substantive right . . .” 28 U.S.C. § 2072. Indeed, in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), both the majority and dissenters expressed agreement on the narrow scope of the legislation authorizing the Federal Rules, although they differed in their resolution of the case before them. According to the majority, a rule would be authorized if it affected “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Id.* at 14. Justice Frankfurter in dissent described the authority as limited to “formulat[ing] rules for the more uniform and effective dispatch of business on the civil side of the federal courts.” *Id.* at 18. And, although the limitation on courts’ rulemaking authority in the Rules Enabling Act is statutory, and is based in part on considerations of federalism, it plainly has constitutional underpinnings.⁶

⁶ The 1926 Senate Report to a predecessor bill made it clear that questions about the judiciary’s authority to make rules “will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.” S. Rep. No. 1174, 69th Cong., 2d Sess. 1 (1926). Indeed, Justice Sutherland testified that the courts’ rulemak-

(footnote continued next page)

Here, by contrast, there can be little doubt that the sentencing guidelines are intended to be substantive rather than merely procedural. As this Court observed in *Miller v. Florida*, 107 S. Ct. 2446, 2453 (1987), while the distinction between substance and procedure may sometimes prove elusive, there can be no doubt that sentencing rules are substantive in nature. Although the Commission has criticized the use of a substance-procedure dichotomy to help resolve this case, it has failed to propose an alternative test to apply. While "the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn," *Sun Oil Co. v. Wortman*, ___ U.S. ___, 56 U.S.L.W. 4601, 4604 (1988), the dichotomy remains a useful one. And, more importantly, the purpose behind separating the policymaking from the adjudicatory functions under the doctrine of separation of powers leaves no doubt that the issuing of sentencing guidelines falls on the substance-policymaking side of the line.

The Commission has sought to defend the guidelines on the theory that they merely affect remedies and hence are properly judicial, *i.e.*, they fall on the procedural side of the line. In *Miller v. Florida*, *supra*, this Court rejected a similar claim regarding sentencing guidelines under the *Ex Post Facto* Clause, 107 S. Ct. at 2452, and just last term it twice turned aside analogous efforts, albeit in statutory contexts. *Felder v.*

ing authority "could not involve the making of any substantive law, because the Congress would be powerless to delegate such power to the courts. I should say it would be confined to making rules pointing out the way in which cases should be presented, and the way in which the court should discharge its duty in determining what the substantive law is." Hearing on S. 2060 and S. 2061 before a Subcommittee of the House Judiciary Committee, 68th Cong., 2d Sess. 56 (1924), *quoted in* Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1078 (1982); see also *id.* at 1106-07 (Congress intended to keep substantive lawmaking in Congress and away from the Court).

Casey, ____ U.S. ____, 56 U.S.L.W. 4689, 4692 (1988) (state notice of claim and exhaustion requirements in conflict with 42 U.S.C. § 1983), and *Monessen Southwestern Ry. v. Morgan*, ____ U.S. ____, 56 U.S.L.W. 4494 (1988) (prejudgment interest and discounting lost earnings to present value in conflict with Federal Employers' Liability Act).

In defending its authority, the Commission has argued that the guidelines simply operate "in aid of a central judicial function." Brief of Sentencing Commission in Support of Certiorari at 5. According to the Commission, just as the courts may issue procedural rules, police the members of the Judicial Branch, or even appoint counsel to prosecute criminal contempt cases when the Justice Department declines to do so, they can issue sentencing rules. Similarly, the Commission points to the various committees of judges, including those of the Judicial Conference of the United States, none of which operates solely in the context of a case or controversy.

There are, however, several substantial differences between those non-adjudicatory functions, which may be properly undertaken by Article III judges, and the issuing of sentencing guidelines, which judges may not do. Some of these activities produce reports or recommendations that are advisory, while the guidelines are binding. Others, such as the Federal Rules of Civil Procedure, are binding but not substantive, whereas the guidelines are both binding and substantive. Still others, such as investigations of judicial misconduct, principally affect the judiciary, and could not appropriately be conducted by another branch, except as part of an impeachment proceeding.

In contrast to those activities, which are properly characterized as "in aid of" the judicial function, sentencing guidelines do not "aid" the judicial function of sentencing: they control it. Indeed, it seems far more accurate to describe judges as "aiding" the implementation of the sentencing guidelines, rather than, as the Commission describes it, the guidelines acting "in aid of" the judicial role of imposing sentence. *Cf. Miller v. Florida*, *supra*, 107 S. Ct. at 2453 (rejecting claim that changes

in sentencing guidelines only changed the exercise of sentencing judge's discretion). Therefore, this Court should reject the Commission's "in aid of" argument just as it rejected similar efforts to save the unconstitutional structure of the Federal Election Commission as "in aid of" Congress' powers over elections. *See Buckley v. Valeo, supra*, 424 U.S. at 138. *See also Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73, 77 (1982) (rejecting arguments supporting authority of Bankruptcy judges on theories that their activities were "related to" or "adjunct" to those of Article III judges). *Cf. Bowsher v. Synar, supra*, 106 S. Ct. at 3202-03 (Stevens, concurring) (rejecting claim that Comptroller General properly exercises "ancillary" functions of Congress under Gramm-Rudman law).

The same point can be made by comparing the goals of the procedural rules on the one hand and those of the sentencing guidelines on the other. The goal of procedural rules is to enable the truth to prevail by permitting the facts to be brought forth and the legal issues to be decided fairly and efficiently. *See Ely, The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724-25 (1974). Thus, procedural rules are intended to provide for fair adjudication, not to favor one outcome over another. *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965). Indeed, unless one becomes a litigant, the Rules do not, and are not intended to, affect individuals in our society. While it is true that some rule changes make it easier for one side to prevail by either increasing or removing barriers to proof, their purpose is not to alter the result, but to achieve a balanced set of procedures that will promote justice. *Id.*

By contrast, the purpose of the sentencing guidelines is precisely the opposite. These guidelines are laden with value judgments about the appropriate level of punishment, both for the particular offense and as compared to other offenses. The Commission, consistent with its statutory mandate, chose particular levels of punishment for particular offenses for the very purpose of achieving certain goals of deterrence and punish-

ment. Thus, it is only by overlooking the intended deterrent effect on the public at large, and in particular on that portion that is wont to commit crimes, that the Commission can even argue, as it did below, that it is the judges whose conduct is being regulated and that the guidelines have no substantive impact on the general public. To the contrary, for those found guilty, the guidelines actually control the amount of time that they will serve and do not merely set the procedures that judges must use in deciding which sentence will be imposed.⁷

In other cases, the Commission has acknowledged that there are limits on what functions the Judicial Branch may constitutionally perform, even if the function relates in some way to litigation. Thus, it has admitted that it could not issue "binding antitrust guidelines through rulemaking," Brief for Sentencing Commission at 38, in *Gubiensio-Ortiz v. Kanahale*, No. 88-5848, and *United States v. Chavez*, No. 88-5109, 9th Cir., April 28, 1988, because such rules would bind the general public rather than the courts. *Id.* at 39. But as we have shown,

⁷ Another way to see the contrast between these guidelines and the Rules of Civil Procedure is to read the introductions to them. The introduction to the guidelines reads like a report of a committee of Congress or the description of a new rule being issued by an administrative agency, both as to tone and content. The introduction to the various drafts of the first Rules of Civil Procedure are written by and for lawyers in a matter of fact style. Advisory Committee on Rules for Civil Procedure, Report and Proposed Rules of Civil Procedure for the District Courts of the United States v-viii (April 1937); Advisory Committee on Rules for Civil Procedure, Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia viii- xviii (May 1936) ("1936 Rules Report"). Indeed, the "problems of policy" identified by the Advisory Committee in the first draft available for public scrutiny featured such issues as whether to require filing for all actions at the outset, the standard of review in non-jury cases, and the introduction of summary judgment, which would not be considered highly charged issues of a kind our elected representatives should address. 1936 Rules Report at ix, ix-xi, xiii-xiv & xvi-xvii.

sentencing guidelines affect, and are intended to affect, the general public, and it is only by ignoring their intended deterrent purpose that the Commission can argue to the contrary.

But more fundamentally, the Commission's argument for an exception to the narrow scope of Article III has "no limiting principle." *Northern Pipeline Co.*, *supra*, 458 U.S. at 73. If the Sentencing Commission can issue sentencing guidelines, then another Commission or this Court could, at least as far as separation of powers is concerned, be delegated such tasks as establishing rules quantifying appropriate levels of damages for pain and suffering for federal claims, prescribing when and in what amounts punitive damages should be awarded (and how they should be apportioned among plaintiffs, their attorneys, and public entities), promulgating statutes of limitations for federal causes of actions, and setting rates for the payment of attorneys fees. Indeed, Congress might even assign the judiciary the job of codifying the federal criminal code, which has proven so difficult to do in the past. All of these can be characterized as "in aid of" the judicial function, or as dealing with remedies, as the Commission uses those terms, yet they all are wholly different in kind from the functions traditionally performed by the Judicial Branch, and functionally indistinguishable from issuing sentencing guidelines.

Examining the kind of judgments that the Commission has made in issuing the sentencing guidelines leaves no doubt that it has entered into the policy-making domain. It has decided what factors are relevant in sentencing, when probation should be allowed, and how much incarceration will be needed to achieve what it considers to be appropriate levels of deterrence and punishment. Moreover, it has done so without political accountability to the electorate, as the President or Congress would have when they make policy judgments of this kind. As this Court observed in *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923), when it dismissed the case for lack of standing, the dispute here is "political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the

judicial power." We do not suggest that judges have no proper role in the sentencing process, but only that the Judicial Branch cannot constitutionally undertake the one assigned to the Commission in the Sentencing Reform Act.

The purposes behind Article III's case or controversy limitations—"to help insure independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for other branches," *Morrison*, 56 U.S.L.W. at 4842—lend further support to our position. In *The Federalist*, James Madison highlighted the dangers of Judicial Branch involvement in executive or legislative activities:

Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

The Federalist No. 47, at 303 (Rossiter ed. 1961), quoting Montesquieu (emphasis as quoted). *Accord Glidden Co. v. Zdanok*, *supra*, 370 U.S. at 582 (limiting judicial power to deciding cases is based on the "Framers' desire to safeguard the independence of the judicial from the other branches. . . .") The Sentencing Commission involves precisely this combination of functions, which, as feared by Madison, threatens the judicial independence that is so vital to separation of powers.

There is another essential strand underlying the separation of powers as it applies to Article III: the need to ensure both impartiality and the appearance of impartiality. See Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. Chi. L. Rev. 993, 1010-25 (1986). As Justice Frankfurter remarked, the intimate involvement of Article III judges in the process of policymaking and legislating "weaken[s] confidence in the disinterestedness of the judiciary functions." F. Frankfurter, *Advisory Opinions*, in 1 *Encyclopedia of the Social Sciences* 474, 478 (1930). This caution was shared by Chief Justice Stone, whose views on the

subject were grounded in separation of powers concepts, but not limited by what the Constitution alone prohibits. See Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193 (1953).

One of the most thoughtful statements of the reasons why judges should confine their activities to deciding cases is that of Judge Skelley Wright in his dissent from the opinion of the three-judge court in *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967). The issue there was the constitutionality of the appointment by the District Court for the District of Columbia of the members of the District of Columbia School Board, which the majority sustained based on the Appointments Clause and the special powers that Congress has over the District of Columbia, neither of which is applicable here. After noting the problems of judges diverting their time from deciding cases and their lack of specific competence for choosing the members of the school board, Judge Wright highlighted several reasons for restricting judges' activities which apply directly to this case:

- Since these issues involve democratic choice, it is politically illegitimate to assign them to the federal judiciary, which is neither responsive nor responsible to the public will. Moreover, it misleads the public to camouflage the legislative character of a social decision and shore up its acceptability by committing it to the judiciary, thereby cashing in on the judicial reputation. Most critically, public confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. Judges should be saved "from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties."

265 F. Supp. at 923, *quoting*, *Matter of Richardson*, 247 N.Y. 401, 420, 160 N.E. 655, 661 (1928) (Cardozo, C.J.).

One provision in the Sentencing Reform Act, on which we have not previously focused, underscores the political nature of the job of writing sentencing rules and therefore why it cannot

constitutionally be performed by the Judicial Branch. Included in the section describing the composition of the Sentencing Commission is the following sentence: "Not more than four of the members of the Commission shall be members of the same political party." 28 U.S.C. § 991(a). The concept is, of course, not an uncommon one, appearing in the statutes governing numerous bodies such as the Federal Election Commission, 2 U.S.C. § 437c(a)(1); the Federal Communications Commission, 47 U.S.C. § 154(b)(5); the Federal Trade Commission, 15 U.S.C. § 41; the Securities and Exchange Commission, 15 U.S.C. § 78d(a); and the Commission on Civil Rights, 42 U.S.C. § 1975(b). But all of those Commissions are in the Executive Branch, and all of them have major policymaking responsibilities. By way of contrast, the Sentencing Commission is in the Judicial Branch, and it is, we believe, the only body within that Branch to have a similar limitation in its enabling provision.

What is important is not its uniqueness, but the fact that its inclusion is a clear recognition by Congress that the Sentencing Commission would be making political and other policy judgments of the kind normally made by the Executive and Legislative Branches. The absence of a similar provision in the statute governing this Court's powers to issue procedural rules strongly reinforces the vast differences between that authority and the power to issue sentencing guidelines at issue here. As demonstrated above, the Commission in fact made countless political decisions in issuing these guidelines, as Congress expected that it would, yet by doing so, it stepped outside the proper boundaries of Article III activities. In short, this is another case, like *INS v. Chadha*, *supra*, where "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 462 U.S. at 951.

B. The Composition of the Commission and the President's Control Over its Members Violate the Separation of Powers.

Even if the Commission could constitutionally issue sentencing guidelines despite its assignment to the Judicial Branch,

that would be permissible only if the entire Commission were composed of Article III judges, insulated from outside interference, as is true for this Court when it issues rules pursuant to 28 U.S.C. § 2072. In that case, the protection of life tenure and the prohibition against reductions in salary would provide an independence that at least arguably offsets the absence of political accountability found in the Executive and Legislative Branches. But that is not this case for two separate reasons: the Commission is not composed entirely of Article III judges, and the President retains substantial authority to control the activities of the Commission.

Of the seven Commission members, only three are Article III judges. This sharing of power with non-Article III judges runs afoul of the Constitution. As this Court observed in *United States v. Nixon*, 418 U.S. 683, 704 (1974):

[T]he "judicial Power of the United States" vested in the federal courts by Art[icle] III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

See also *INS v. Chadha*, *supra*, 462 U.S. at 958 (condemning legislative veto as impermissible sharing of power). Similarly, the provisions of the Bankruptcy Code that could have been viewed as an effort to share power between Article III judges and bankruptcy judges, who lacked Article III's protections of life tenure and the guarantee against reduction in salary, were set aside on separation of powers grounds in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), even though the rulings of bankruptcy judges were subject to judicial review by the Article III courts.

But even if the presence of four non-judges does not constitute an impermissible sharing of power, there is another separation of powers flaw in the composition of the Sentencing Commission—the presidential role in overseeing its operations

and in controlling it. Thus, all seven Commission members are appointed by the President, and he chooses the chairman, who is now Circuit Judge William B. Wilkins, Jr. They all serve for staggered terms, and the President decides who will have which terms, and whether or not to reappoint them. Most important of all, the President alone has the power to remove Commission members, which he may do for cause.

The question is whether this continuing presidential role in a Judicial Branch body violates principles of separation of powers. As the Court observed in *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), such an inquiry "focuses on the extent to which [the Act] prevents the [particular] Branch from accomplishing its constitutionally assigned functions . . . and [a violation occurs] [o]nly where the potential for disruption is present" But as this Court emphasized in *Northern Pipeline*, *supra*, 458 U.S. at 59, 60, the independence of the Judicial Branch must be jealously guarded from outside interference. *See also*, *United States v. Will*, 449 U.S. 200, 217-18 (1980): ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."); *The Federalist No. 48*, at 308 (J. Madison) (Rossiter ed. 1961) ("none of [the branches] ought to possess, directly or indirectly, an overruling influence over the other in the administration of their respective powers.")

These principles were recently applied in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), which held that the Comptroller General could not constitutionally perform executive functions because he could be removed by Congress, and hence was under the potential influence of the legislative branch of government: "a direct congressional role in the removal of officers charged with the execution of the laws beyond [the power of impeachment] is inconsistent with separation of powers." *Id.* at 3187. Thus, where a function has been assigned to a particular branch of government, either by the Constitution or, as in most cases, by

legislation, another branch may not interfere with it, absent some express authority for such a role in the Constitution. As this Court subsequently described *Bowsher*, the case involved a "question of the aggrandizement of congressional power at the expense of a coordinate branch." *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3261 (1986).

The President has at least as much, if not more, control over the Sentencing Commission than Congress had over the Comptroller General in *Bowsher*. Thus, the statutory bases for removal in the two statutes are substantially the same, although not identical.⁸ However, the Comptroller General could be removed only if a majority of both Houses of Congress and the President, or two-thirds of each House without the President, agreed that the statutory conditions had been met. In this case, the President alone may decide to remove a Commission member. Moreover, unlike this case, the Comptroller General was entitled to prior notice and an opportunity for a hearing, whereas no such protections are explicitly provided for Commission members. Finally, the Comptroller General serves only a single 15-year term and cannot be reappointed, whereas Commission members may be reappointed or not, as the President chooses, thus giving him an additional lever that Congress did not have over the Comptroller General. Moreover, two Executive Branch officials—the Attorney General and the Chairman of the Parole Commission—sit as *ex officio* members of the Sentencing Commission to provide input from the Executive Branch and, not incidentally, to maintain a close watch on what the Commission is doing.

⁸ The President has the power to remove members of the Sentencing Commission for "neglect of duty or malfeasance in office or for other good cause shown," 28 U.S.C. § 991(a), while Congress has the power to remove the Comptroller General for "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1)(B).

The Commission contended below that *Bowsher* is distinguishable because it applies only when the function at issue is inherently part of the branch in which it is placed and another branch holds the removal power. According to that argument, the President's removal power is proper here because others besides judges have traditionally played roles in the sentencing process and thus sentencing is not inherently judicial. However, until 1985, when the Gramm-Rudman Act was passed, the functions performed by the Comptroller General under that Act were not executive at all, but were performed by Congress as part of the appropriations process. Thus, *Bowsher* cannot be read, as the Commission would like, to apply only to intrusions on powers that are inherently part of the branch whose officials are subject to outside interference.

Finally, the Commission has contended that, even if the President can remove Article III judges, it is of little consequence since they will automatically resume their judicial duties at their current pay. That is true now only because all three judicial members are circuit judges, and all Commissioners are paid at the rate for circuit judges. 28 U.S.C. § 992(c). But it would not have been true initially since Chairman Wilkins was then a district judge. Moreover, the Commission overlooks the reality that no one likes to be fired, especially for cause, and thus Commission members may be willing to bend to the President's will in order to avoid such action. And of course, the Commission includes four non-judges who do not have lifetime appointments to which they can return if they incur the displeasure of the President.

Thus, this situation involves the same kinds of threats of inter-branch interference that the Court found unacceptable in *Bowsher, supra*, 106 S. Ct. at 3189-91. The Court there observed that the unconstitutionality of the statute did not depend on establishing that the removal power will in fact be exercised, because the structural protections afforded by separation of powers not only guard against actual abuses of power, but provide a shield that is "critical to preserving liberty." *Id.*

at 3190-91. The problem in both this case and *Bowsher* was aptly described, and the answer to it given, over 50 years ago in *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935): "The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." Or, as the Court observed in upholding the authority of judges to initiate contempt proceedings, the courts "cannot be at the mercy of another branch" in carrying out their functions. *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*, 107 S. Ct. at 2131.

C. The Sentencing Commission Cannot Be Judicially Reassigned to the Executive Branch to Cure Its Unconstitutionality.

After concluding that "the work of the Commission in carrying out the Congressional mandate can be more conventionally described as executive rather than judicial," the district court upheld its constitutionality by "judicially characteriz[ing it] as having Executive Branch status." App. 4a. Similarly, the Justice Department has argued that the sole infirmity in the Act is the placement of the Commission in the Judicial Branch, that the problem can be cured by severing the offending language, and that the guidelines can be saved by a judicial reassignment of the Sentencing Commission from the Judicial to the Executive Branch of government. To support that effort, the Justice Department claimed that the label attached by Congress to an activity is not necessarily dispositive of separation of powers questions, citing *Bowsher v. Synar*, *supra*. That kind of rewriting of the Sentencing Reform Act is unavailing for several reasons.⁹

⁹ We do not concede that a purely executive body, with no federal judges as members, would survive a separation of powers challenge since such a body would unite in one branch the power to prosecute with the power to decide the proper sentence, thereby running afoul of the concern of the Framers that the power to enact laws should not be united with the power to execute them, lest tyranny result. See *Buckley v. Valeo*, *supra*, 424 U.S. at 120-21, quoting Madison, see *supra* at p. 28, who, in turn, was quoting and relying on Montesquieu.

1. There is No Basis For Reassigning the Commission To the Executive Branch.

There is no judicial precedent to support "reassignment." In *Bowsher*, the issue was whether the Comptroller General could constitutionally perform certain functions under the Gramm-Rudman Act in view of the fact that Congress had retained the power to remove him. This Court held that he could not because the functions to be performed were executive in nature, and no person performing such functions could be subject to removal by Congress. The question in *Bowsher* was who controlled the Comptroller General since, after *INS v. Chadha*, *supra*, it is clear that neither Congress, nor any person operating under its control, can constitutionally carry out the function of executing the laws. Thus, the observation in *Bowsher* that several statutes placed the Comptroller General in the Legislative Branch was part of the discussion showing that he was under the control of Congress, not the President. 106 S. Ct. at 3191.

The Court next undertook an analysis of the functions at issue in *Bowsher* in order to determine whether those functions were legislative, in which case they could be performed by the Comptroller General, or executive, in which case they could not. The Court did not, as the government suggests, reassign the Comptroller General in order to *save* his status, which is what the government is asking the Court to do here. Indeed, the statute establishing his office does not place it in either branch, but instead makes it "an instrumentality of the United States Government independent of the executive departments." 31 U.S.C. § 702(a), *quoted* at 106 S. Ct. at 3191. Thus, neither *Bowsher* nor any other case of which we are aware authorizes the Court, as a means of saving a function from running afoul of separation of powers, to disregard an explicit congressional statement to place that function in an improper branch of government. To the contrary, this Court has admonished the lower courts that they are not free to judicially rewrite statutes or "to manufacture a restriction" in order to avoid a constitutional question. *Commodity Futures Trading*

Comm'n v. Schor, *supra*, 106 S. Ct. at 3255. Therefore, the constitutionality of the Commission must be determined on the basis of the statute as written, and not as the Justice Department would like to have it rewritten.

The problem is not merely one of mislabelling or a slip of the word processor. Several separate references in the Senate Report establish that the Senate made a conscious determination to place the Commission in the Judicial Branch. Thus, the Committee stated that the Sentencing Commission "would be in the judicial branch. . . ." S. Rep. at 63; 1984 USCCAN 3246. On the following page, it added that it had acted to ensure the role of all three branches, "rather than only the judicial branch," in the selection of the members of the Sentencing Commission, and it then observed that the bill "does assure the judiciary a role in the selection of the members and does place the Commission in the judicial branch." S. Rep. at 64; 1984 USCCAN 3247.

In the section by section analysis, the Committee made its point even clearer: "Placement of the Commission in the judicial branch is based upon the Committee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." S. Rep. at 159; 1984 USCCAN at 3342. Finally, in discussing the provision that authorized federal judges to serve as Commission members without having to resign their judicial positions, the Committee found this to be appropriate, since the judges will remain in the Judicial Branch and will be engaged in activities closely related to traditional judicial activities, and found it necessary to assure that highly qualified judges are not excluded by having to resign a lifetime appointment in order to serve on the Commission. S. Rep. at 163; 1984 USCCAN at 3346.

Moreover, as noted above (at 4), not only did the House concur in the placement of the Commission in the Judicial Branch, but it would have had the Judicial Conference appoint all of the Commissioners. It wanted to keep the Commission out of the Executive Branch to avoid altering the roles tradi-

tionally played by Congress and the Judiciary in determining sentences:

Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. 95 (1984). The House Report also stressed that the Judicial Conference approach would allow the Commission to "remain[] independent of contemporary political currents." *Id.* Although, in the end, Congress did not place the Commission under the Judicial Conference, the emphasis in the House Report on the Commission's independence from the Executive Branch, which is echoed in the Senate Report, demonstrates that Congress gave great weight to the location of the Commission in the constitutional scheme. Thus, if there is a problem with the placement of the Sentencing Commission in the Judicial Branch, it is the responsibility of Congress, not the courts, to correct it.

The premise underlying the Justice Department's contention that the courts can move the Commission, and thereby avoid a constitutional problem, is groundless. The basis of this assumption is that Congress' placement of the Commission in the Judicial Branch has "no real-world consequences" other than who signs paychecks. However, there is far more at stake than simply correcting a label or placing the Commission in the proper box on an organizational chart of the federal government. Thus, one significant consequence is that, because the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and the Government-in-the-Sunshine Act, 5 U.S.C. § 552b, apply only to executive, and not to judicial, bodies, the Commission is exempt from these laws, as well as from the Federal Advisory Committee Act, 5 U.S.C. App. I, which applies only to advisory committees that serve the President or executive agencies, but not the judiciary.

Second, the Commission's budget is now grouped with the Judicial, not the Executive, Branch. Although all of the funds

come from the Treasury Department, the President must include in the budget he sends to Congress the figures from the Judicial and Legislative Branches "without change." 31 U.S.C. § 1105(b). Obviously, the power to alter the budget request of the Sentencing Commission is a matter of considerable significance, at least to the Commission, if not to the President, but the President has no such power under the hands-off rule of section 1105(b), which is informed by, if not required by, principles of separation of powers.¹⁰

Third, if the Commission is part of the Executive Branch, then the activities of its members and staff are controlled by certain conflict of interest statutes that do not apply to the Judicial Branch, the most prominent of which are 18 U.S.C. §§ 207 and 208. Compare 18 U.S.C. § 205, which specifically includes officials of the Judicial Branch. Other federal statutes, such as the prohibitions on discrimination contained in Title VII, see 42 U.S.C. § 2000e-16(a), and various civil service statutes, see 5 U.S.C. §§ 2102-2103, also apply to the Commission and/or its staff only if the Commission is in the Executive Branch. On the other hand, the Commission is authorized by 28 U.S.C. § 995(a)(10) to issue instructions to probation officers, who are part of the Judicial Branch, see 18 U.S.C. § 3602, which would be highly unusual, if not inappropriate, for an Executive Branch agency to do. Moreover, under 28 U.S.C. § 994(w), the Commission can require judges or court officers to submit written reports for each sentence imposed, a power that the Executive Branch would not normally exercise over federal judges or other judicial officers.

Fourth, if the Commission is part of the Executive Branch, it is clear that none of the judicial members can sit on any case that involves any part of the Executive Branch of the government because to do so would deprive the other parties of the

¹⁰ Along the same lines, Congress directed the Commission to obtain support services from the Judicial Branch. See 28 U.S.C. § 995(b).

independent Article III judiciary that the Constitution requires. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, *supra*, 106 S. Ct. at 3256; *In re Murchison*, 349 U.S. 133, 136 (1955).

For all of these reasons, the placement of the Sentencing Commission in the Judicial Branch is hardly an inconsequential matter, with no practical significance. While the Executive Branch claims that it is only asking the Court to disregard what it sees as a single offending phrase, what it is really asking the Court to do is to rewrite the statute and alter the relationship of the Commission to other parts of the federal government in a number of very substantial ways, plainly not intended by Congress. This, we submit, is not severance, but judicial revision of legislation, which is also barred by separation of powers.

2. Reassigning the Commission to the Executive Branch Would Not Make It Constitutional.

Even if this Court could rewrite this statute, it would not save the Commission. Rather, it would create another constitutional objection—that Article III judges are improperly serving in an Executive Branch agency, carrying out very substantial executive functions. The service of judges on the Sentencing Commission runs afoul of James Madison's admonition in *The Federalist* against joining the power of the legislature and the judiciary in one person. See *supra* at p. 28. Indeed, the Constitutional Convention rejected a proposal to establish a "Council of Revision," composed of Supreme Court Justices and high Executive Branch officials, that would review all legislation and, if the Council found the legislation objectionable, call upon Congress to reexamine it. See *The Federalist No. 69*, at 416-17 (Rossiter ed. 1961). As Alexander Hamilton explained in *The Federalist No. 73*, this proposal was rejected because, first, "judges, who are to be the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities. . . ." Second, the Convention feared any unification of executive and judicial power:

[B]y being often associated with the executive, [judges] might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. *It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the executive.*

Id. at 446-47 (emphasis added).

While this Court has not had occasion to address the issue of whether Article III judges may perform non-judicial functions in the Executive Branch, this question has recently been the subject of two appeals court rulings involving the presence of Article III judges on the President's advisory committee on organized crime. *Application of the President's Commission on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985), and *Matter of the President's Commission on Organized Crime (Scarfo)*, 783 F.2d 370 (3d Cir. 1986). Of the six judges who considered the question of whether judges could even serve on a purely advisory body, four found that judges could, and two concluded that they could not. *See generally* Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. Chi. L. Rev. 993 (1986).

More significant than the holdings in those cases is that those judges who found no objection to such service were very cautious in their approvals. First, both *Scaduto* and *Scarfo* recognize that service by judges in non-judicial capacities, while of long-standing duration, albeit of relatively infrequent usage, has never been judicially approved, 763 F.2d at 1202; 783 F.2d at 377, and it has been extremely controversial. *See* Slonim, *Extrajudicial Activities and the Principle of Separation of Powers*, 49 Conn. Bar J. 391, 402-03 (1975); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 126. Indeed, judges have often refused to serve in extra-judicial capacities on separation of powers grounds and have criticized others for accepting such service. *See, e.g.,*

Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193, 197, 199-205, 207-12, 213-15 (1953) (the Chief Justice refused to serve on a commission studying the nation's rubber supply policies during World War II, as well as on several other commissions, including the Atomic Energy Commission, because of the incompatibility of such service with his judicial position). Moreover, the history of such judicial service has not been so universal or unbroken that it can serve as a proper precedent for judicial service in the Executive Branch. See Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363, 1381-84 (1987).

Second, the advisory nature of the Organized Crime Commission was the essential ingredient needed to save it from unconstitutionality. As Judge Roney, who voted to uphold the practice in *Scaduto*, observed, the Commission's role is "simply to advise and recommend," and it has "no autonomous authority to impose sanctions or implement final binding action." 763 F.2d at 1205. And in *Scarfo*, the court ruled that, while there may be certain circumstances under which judges violate the principles of separation of powers by undertaking non-judicial acts, service on the Crime Commission was acceptable because the judges were simply rendering advice, and the appearance of bias could be addressed by recusals in specific cases. 783 F.2d at 379-81. Here, of course, the Commission is not an advisory body, but an operative one whose rules become law unless they are overturned by Congress. Indeed, if the Sentencing Commission can have Article III judges as voting members, there would have been no doubt about the propriety of a purely advisory body, such as the Crime Commission, especially since only two of its nineteen members were federal judges. See *Scarfo*, *supra*, 783 F.2d at 371.

The narrow rulings in favor of permitting service on the Crime Commission provide absolutely no support for the proposition that Article III judges may serve on bodies like the Sentencing Commission that are performing not simply

advisory, but operational, functions of a substantive, policy-making nature. No case supports any such sweeping proposition, and the GSA's regulations implementing the Federal Advisory Committee Act suggest the opposite by the clear line that they draw between operational and advisory bodies. 41 C.F.R. § 101-6.1004(g) (1987).

The court below concluded that judicial service on an executive body presents no problem so long as it is "voluntary," App. 4a-5a, which we understand to mean that no particular Article III judge has been required, or as the Commission has put it, "conscripted," to perform executive functions. However, in *Scaduto*, the majority found the composition of the Crime Commission unconstitutional, despite the voluntary service of the two judicial members, and in *Scarfo*, the Third Circuit qualified its reliance on the voluntariness of the judges' service by noting that "[n]either the enabling statute nor the Executive Order mandates inclusion of judicial members." 783 F.2d at 376. Most significant of all, it then cited the Sentencing Commission as an example of a body on which judicial service has been mandated. *Id.* at 376 n.3; *see also id.* at 378-81.

Thus, as *Scarfo* recognized, service on the Sentencing Commission by federal judges is not "voluntary" because the statute requires the participation of three Article III judges, and thus this is not a case, as the Department has suggested, where three of the Commission's members "happen to be judges." Brief of United States at 27, in *Gubiensio-Ortiz v. Kanahale*, No. 88-5848 and *United States v. Chavez*, No. 88-5109, 9th Cir., April 25, 1988. While no individual judge is required to serve on the Commission, Congress and the President have, in effect, conscripted three judges from among the ranks of the federal judiciary to serve on the Commission on a full-time basis, which thereby weakens the judiciary to that extent. Moreover, given the major roles that all three judges have in the development of the sentencing guidelines, and the fact that their votes were needed to approve the guidelines, the impact on the judiciary is even greater because, not only are

they unavailable to serve while they are on the Sentencing Commission, but they also must inevitably disqualify themselves from all future criminal cases involving sentencing issues.

But even if individual judges can avoid the loss of impartiality that may flow from such commingling of powers, the service of judges on the Sentencing Commission also interferes with the Judicial Branch by giving the appearance of a loss of judicial independence. *See Comment, Separation of Powers, supra*, 53 U. Chi. L. Rev. at 1010-25. Moreover, all of the reasons given by Judge Wright and others on pages 28-29, *supra*, why functions such as these should not be performed by the Judicial Branch, if principles of separation of powers and the appearance of judicial impartiality are to remain intact, apply equally when the agency on which the judges serve is in the Executive Branch.

Finally, the district court accepted the argument of the Justice Department based on the absence of a comparable "constitutional prohibition on dual service (applicable to members of Congress)" through the Incompatibility Clause in Article I, § 6, cl. 2. App. 4a. Since there is no comparable prohibition for judges, the government argues, the omission constitutes an approval of dual appointments, which permits the sharing of executive powers with members of the Judicial Branch. Once again, decisions of this Court, in particular the portion of *United States v. Nixon*, quoted *supra* at 31, make it clear that such a sharing arrangement is expressly forbidden by the Constitution. *See also INS v. Chadha, supra*, 462 U.S. at 958.

Moreover, as the Court observed in *Springer v. Philippine Islands, supra*, 277 U.S. at 202, the inclusion of express exceptions to separation of powers "emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule." *See also INS v. Chadha, supra*, 462 U.S. at 955 (inclusion of specific inter-branch roles underscores unconstitutionality of legislative veto). Here, the fact that the courts of

law are specifically permitted by the Constitution to appoint inferior officers, when Congress so authorizes, and the fact that the Chief Justice is the presiding officer in cases of trials of impeachment before the Senate, serve to underscore the absence of any authorization for Article III judges to perform Executive Branch functions of the kind undertaken here, whether the body is formally situated in the Executive or Judicial Branch of government.

Indeed, we are simply unable to fathom how, according to the Justice Department, the seven Commission members cannot perform the task of issuing sentencing guidelines as part of the Judicial Branch, due to the doctrine of separation of powers, but those same seven individuals are freed of that limitation if the label attached to their Commission is executive. The three Commission members who are Article III judges are Article III judges for life, and their status is unchanged when they remove their robes or when they are addressed as "Commissioner" rather than "Judge." In our view, the separation of powers limitations on the proper function of judges apply whether the Commission is in the Executive or Judicial Branch, and we do not understand the basis of the Justice Department's argument to the contrary.

But the most telling reason why this inter-branch assignment of judges on a "voluntary" basis cannot be upheld is because its logic contains no limiting principles. If Congress decided that it would be advisable to have an experienced federal judge occupy a seat on the Securities and Exchange Commission, the government's position would allow Congress to require that a sitting federal judge fill that job. Or, it could decide that the head of the FBI must be an active judge in order to assure that the agency will protect the civil liberties of the accused, or that the war on drugs requires the service of the Chief Justice as "drug czar." Similarly, it could require that top officials in the Justice Department sit with this Court in deciding on the Federal Rules of Criminal Procedure. Indeed, a federal judge could sit on cases dealing with one agency in the

morning and preside over a meeting of another in the afternoon, without offending separation of powers. The possibilities are endless if judges can assume substantive roles in the Executive Branch, so long as they do so on a "voluntary" basis and perform those duties only in their "individual," not judicial, capacities, simply by removing their judicial robes. No authority allows separation of powers to be so trammelled by such a formalistic approach.

The doctrine of separation of powers was not created to keep organizational charts neat, but to prevent officials in one branch from taking on the duties of another. *INS v. Chadha*, 462 U.S. at 951; *id.* at 963 (Powell, J., concurring). Accordingly, its proscriptions apply to people, not just to entities, and under our system it is the function of judges to decide the law, not to write it, regardless of where they are located in a government organizational chart and regardless of whether they are wearing their robes. Because it is unconstitutional for Article III judges to perform the non-judicial tasks assigned to the Commission when it is part of the Judicial Branch, it can only compound the problem by moving the Commission into another branch. Thus, even a judicial rewriting of the statute to make the Commission part of the Executive Branch will not save the guidelines.

* * *

This system for issuing sentencing guidelines is not one of separated powers, but of blurred responsibility. Congress passed a broad law, established a Commission, and then declined to review its substantive work, let alone approve it. 133 Cong. Rec. H8107-13 (daily ed. Oct. 5, 1987); *id.* at H8215 (daily ed. Oct. 6, 1987). The President was limited in his selection by the requirement that he include three judges on the Commission, and by the limitations on his influence over it because it is in the Judicial Branch. The judiciary, while having its representatives on the Commission, has no say in the selection of a majority of the Commission, no check on the President's unfettered reappointment power, and little ability to

resist if the President tries to remove a member, even for cause. As a result, if the public dislikes these guidelines, there is no branch that is truly responsible for them, and that result plainly transgresses the doctrine of separation of powers.

In striking down the legislative veto in *INS v. Chadha*, this Court observed that the veto "has been in many respects a convenient shortcut; the 'sharing' with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise . . . [which] is obviously easier [than obtaining full legislation]." 462 U.S. at 958. But that did not save the veto because the "Framers ranked other values higher than efficiency." *Id.* at 959. The same kinds of sharing of powers, short-cuts, and political compromises that brought about the constitutional downfall of the legislative veto are fully present here. The question of whether the sentencing guidelines are sound policy is not before the Court. The sole question is whether the process by which they were reached is consistent with our Constitution. For all of the reasons described above, we respectfully submit that it is not and ask the Court to declare the guidelines unconstitutional.

II. THE GUIDELINES ARE UNCONSTITUTIONAL BECAUSE THE DELEGATION TO THE SENTENCING COMMISSION IS EXCESSIVE.

The other ground on which the guidelines should be set aside is that the delegation to the Commission of the function of determining sentences for those convicted of federal crimes is excessive. We recognize that Congress need not make every single judgment in connection with sentencing rules, but the discretion granted here to the Commission is excessive under the applicable standards. As this Court has remarked, "the power to define criminal offenses and to prescribe the punishments . . . resides wholly with the Congress." *Whalen v. United States*, 445 U.S. 684, 689 (1980). See also *Gore v. United States*, *supra*, 357 U.S. at 393 ("the proper apportionment[s] of punishment . . . are peculiarly questions of legislative policy"). And little more than a year ago, the Court ruled that the *Ex*

Post Facto Clause, which is applicable to legislative actions, prevents a state from increasing the amount of punishment after a crime had been committed, even though an increased penalty, through an amendment to the applicable sentencing guideline, was a realistic possibility when the crime was committed. *Miller v. Florida*, *supra*. While it is Congress that has defined what constitutes a federal crime, the Sentencing Reform Act has handed to the Sentencing Commission the power to make rules for the imposition of criminal sentences on a wholesale basis that has fundamentally transformed the sentencing process in the federal courts.

The question of whether a delegation is excessive was recently reviewed and thoroughly discussed in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (three-judge court), *aff'd sub nom. Bowsheer v. Synar*, 106 S. Ct. 3181 (1986). We need not repeat that discussion or quote the relevant authorities, most of which are referred to in that opinion at pages 1382-91. As that court observed, the "classic exposition of the governing test" is set forth in *J. W. Hampton & Co. v. United States*, 276 U.S. 394 (1928), where Chief Justice Taft held that a delegation is constitutional so long as Congress "'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform. . . .'" 626 F. Supp. at 1383, *quoting J.W. Hampton*, 276 U.S. at 406, 409. Or, as *Synar* also described the test, a court must find "an adequate 'intelligible principle' to guide and confine administrative decisionmaking." 626 F. Supp. at 1389. Thus, whether the delegation is excessive depends on "whether the specified guidance 'sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'" *Id.* at 1387, *quoting Yakus v. United States*, 321 U.S. 414, 425 (1944). To answer that question "requires a careful review of the statute." *Id.*

The Sentencing Reform Act directs the Commission to establish policies and practices that:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B). But this "direction" is really no direction at all, because Congress delegated to the Commission the authority to balance these factors, which the Commission itself recognized are inherently at odds with each other (Guidelines, p. 1.2), as it sees fit, and thereby to establish all sentencing policies for federal criminal offenses, with essentially no congressional principle to guide it in any meaningful sense.

To be sure, there are some limitations. Existing statutory maximum and minimum sentences must be followed, but their very breadth caused the displeasure with the old system. The Commission is also, in essence, required to use a double matrix which considers both the circumstances of the particular offense and the characteristics of the individual offender. And it is also true that the maximum range for a sentencing guideline can be no greater than six months or 25% and that Congress decided to make certain factors such as race, sex, and national origin, irrelevant. 28 U.S.C. §§ 994(b)(2) & (d). The problem, however, lies in what Congress left open for the Commission to decide.

The most important and open-ended decisions that the Commission had to make were how to rank all of the federal offenses in a way that would reflect the relative degree of seriousness of the crime, including the special facts in aggravation and mitigation of the basic charge, how to assess the relevant characteristics of the offender, and then to translate those rankings into sufficiently narrow punishment ranges to meet the 25%/6 months rule set by Congress. Average prior sentences were to be a starting point, but no more, and the Commission regularly deviated from them when it thought a change was appropriate.

Thus, for white collar crimes, the Commission chose to increase the existing sentences because it viewed them as more serious than judges previously found them to be when imposing sentences under the prior system. In doing so, it was not guided by a mandate from Congress, but essentially took Congress' place in deciding what "policy-oriented departures" from prior practices were appropriate. Guidelines, p. 1.4. The question is not whether those changes were justified; they are surely debatable, and if that is the case, the debate should be among our elected legislators, rather than among appointed Commissioners.¹¹

Along with the absolute changes in average sentences for particular crimes, the Commission grouped together at the same punishment levels violations of different provisions of the U.S. Code. Included in this task was the assignment of sentencing ranges for every offense, 28 U.S.C. § 994(c), which resulted in a set of ranges that provides the same sentences for very disparate crimes at each base offense level. Some examples of the highly policy-oriented judgments that the Commission made are set forth on pages 20-21, *supra*, which are in turn taken from the Addendum to this brief. What is most noteworthy about this process, beyond its inevitability in any comprehensive guidelines system such as this, is that all of the rankings could have been raised or lowered dramatically, as the Commission and the Commission alone thought appropriate, and there would have been no basis to object because Congress left all of those choices up to seven politically unaccountable individuals.

¹¹ A similar kind of choice was made in determining where, for instance, different gradations of offense levels for tax evasion should fall. Thus, under the Commission's approach, the seriousness of tax evasion always depends on the amount of tax avoided, but that judgment is one that Congress never made in the past, and is at least subject to serious debate, both in principle and as to the places where the demarcations should be drawn. See Guidelines, ch. 2, pt. T.

The Commission was also required to make a number of other significant unguided judgments beyond "creat[ing] categories of offense behavior and offender characteristics." Guidelines, p. 1.1. It had to make what it called a "fundamental" choice about whether to use a "real offense" system, which virtually eliminated all flexibility, or to go to a "charged offense" system in which the prosecutors' power would be enhanced because of their control over the charge. Preliminary Draft, p. 11. It also decided when probation was permissible and when it was forbidden, opting in favor of a strict system of controls over its use, Guidelines § 5C2.1(b), because of what it decided had been its use for an "inappropriately high percentage of offenders guilty of certain economic crimes." *Id.*, p. 1.8. After a vigorous debate about the role of fines in criminal cases, see Preliminary Draft, pp. 157-61, the Commission decided to require that every non-indigent defendant pay a fine according to a schedule that the Commission devised. Guidelines, § 5E4.2, pp. 5.20-21. It was also given the discretion to determine whether seven offender characteristics "have any relevance" and include them or not (as it did not with age and drug dependence "for policy reasons," Guidelines, p. 4.1), as it saw fit. 28 U.S.C. § 994(d). Finally, it had to decide, with no guidance from Congress, what to do about the prior practice of plea bargaining, whose continued existence in the form of bargaining over charges, could undermine the whole effort to eliminate disparity in sentencing. Although the Commission temporized and made no changes for the present (Guidelines, p. 1.8), what is important is that it was free to select among a variety of options with no concern that it would be violating a congressional mandate.

Perhaps the single most poignant example of the breadth of the Commission's powers relates to its decision as to whether to reinstate the death penalty. Since *Furman v. Georgia*, 408 U.S. 238 (1972), the absence of adequate statutory standards has precluded the use of the death penalty provisions that remain in the Federal Criminal Code for certain offenses. Every recent Congress has debated whether the death penalty should be

reimposed and what procedures would comport with constitutional requirements, but it has been unable to agree over this very contentious matter, except for two crimes for which it established elaborate standards that must be followed before the death penalty may be imposed. *Establishing Constitutional Procedures for the Imposition of Capital Punishment*, S. Rep. No. 99-282, 99th Cong., 2d Sess. 2-4 (1986); 49 U.S.C. §§ 1472-1473 (aircraft piracy); 10 U.S.C. § 906a (espionage by military personnel).

In order to make the death penalty provisions that remain on the statute books enforceable, the Justice Department offered its opinion that the Sentencing Commission had been given the authority under the Sentencing Reform Act to do what Congress has been unwilling to do itself—establish procedures that would bring back the death penalty for a broad range of offenses. Although the Commission eventually determined not to include the death penalty in its guidelines, it did not omit such procedures because it believed that it had no power to include them, but for other reasons, related to its desire to assure that congressional controversy over the death penalty would not prevent the guidelines from going into effect. *Washington Post*, March 11, 1987, at A17, *National Law Journal*, March 23, 1987, at 5. While we have the most serious doubts that the Commission has the authority to reimpose the death penalty through its guidelines, the correctness of that interpretation is not what is important. The fact that the Commission seriously considered this matter, and that there is at least an arguable case that the Commission may have that power, dramatically underscores the sweeping breadth of the Commission's delegated authority.

In their responses below, the Department and the Commission attempted to analogize the delegations here to those made to the Parole Commission, but that analogy is inapposite for several reasons. First, parole guidelines are purely advisory by their own terms, 28 C.F.R. § 2.20(e) (1986), and they are issued merely to assist that Commission in the performance of

its primary duty of making individual parole determinations. See 18 U.S.C. §§ 4204(a)(1) & (b). Second, the Parole Commission's discretion is confined by the sentence imposed by the judge; it cannot increase incarceration time, as the Sentencing Commission did for some crimes for which it believed that past sentences were too lenient, nor can it alter the amount of any fine imposed. Finally, and most important, Congress explicitly told the Parole Commission when a prisoner will be eligible for parole, 18 U.S.C. §§ 4205(a), (b) & (f), and decided what the relevant factors are in making parole decisions, 18 U.S.C. §§ 4206-4207. By contrast, Congress gave the Sentencing Commission *carte blanche* to determine whether the various factors listed in the statute "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence . . ." and directed it to "take them into account only to the extent that they do have relevance. . . ." 28 U.S.C. §§ 994(c) & (d).

In *Synar*, the delegation was upheld because the court found that "the *only* discretion conferred is the ascertainment of facts and the prediction of facts." 626 F. Supp. at 1389 (emphasis in original). Thus, according to the court, the "Comptroller General is not made responsible for a single political judgment. . . ." *Id.* (emphasis in original). The court further found that it was not true that "Congress has declined to make the 'hard political choices,'" but instead that it had "specified in meticulous detail which program budgets will be reduced . . . and by how much." *Id.* at 1391. Since "[a]ll that has been left to administrative discretion" are some relatively minor matters, the court concluded that Congress did not give the Comptroller General any "distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself." *Id.* (emphasis in original).

As we have shown above, the contrast between this case and *Synar* is enormous. Admittedly, Congress gave the Commission a large number of directions, but there are vast policy areas in which it simply turned over to the Commission, on a

wholesale basis, virtually all of the hard policy choices and political judgments, instead of doing the job itself. Thus, the delegation must fail here because Congress failed to lay down "intelligible principles" in so many areas. Insisting that Congress include "adequate standards" serves the function of ensuring that "the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, concurring). Moreover, as Justice Brennan has cautioned about sentencing law, "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people." *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, concurring). In short, Congress has failed to provide the "intelligible principle" to make any of the "hard choices" or "fundamental policy decisions" that must be accomplished in the legislative process. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, concurring). Instead, it has given to the Commission the power to make "the type of substantive moral judgment[s] that [have] traditionally been reserved for Congress," Liman, *supra*, 96 Yale L.J. at 1374, and it is for that reason as well that the delegation here is excessive and must be set aside.

III. THE PROVISIONS OF THE SENTENCING REFORM ACT THAT ABOLISH PAROLE AND LIMIT THE AVAILABILITY OF GOOD TIME CANNOT BE SEVERED FROM THE SENTENCING GUIDELINES.

If the Court agrees that the guidelines are unconstitutional, it must then address the question of severability. Although numerous severability issues may arise, the only questions that must be decided in order for the district courts to make intelligent sentencing decisions concern the extent to which pre-

guidelines sentencing practices still apply. Obviously, the provisions of the Sentencing Reform Act that bind judges to consider and adhere to the guidelines fall with the guidelines. In our view, it is equally obvious that the abolition of parole (and the substitution of supervised release), as well as what the Commission referred to as "substantially restructur[ing] good behavior adjustments," must fall. *See Guidelines*, p. 1.1.

The Sentencing Reform Act is a comprehensive sentencing law which establishes a determinate sentencing system. S. Rep. at 49-50; 1984 USCCAN at 3232-33. The sentencing guidelines are its central feature, with the abolition of parole and the good time changes constituting lesser, but significant, elements of the determinate sentencing scheme. Although Congress could theoretically have changed parole or good time without establishing guideline sentencing, there is no evidence that Congress would have enacted these lesser pieces of the package without the guidelines, and, therefore, this Court cannot save them from the fate of the guidelines.

In *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476 (1987), this Court recently reiterated the test for severability: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 1480, quoting *Buckley v. Valeo*, *supra*, 424 U.S. at 108, which quotes *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Thus, "[w]hether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent. . . ." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Moreover, as this Court has instructed, it is also critical that "the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines*, 107 S. Ct. at 1481 (emphasis in original).

The starting point for assessing congressional intent is the language and structure of the statute itself. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108

(1980). Here, both elements make it clear that Congress would not have enacted the parole and good time provisions without the sentencing guidelines. First, the statute itself provides that the abolition of parole and the new good time rules apply only to sentences that are imposed under the sentencing guidelines system. *See* 18 U.S.C. §§ 3551, 3558 & 3624. Second, the effective dates of the various provisions of the Sentencing Reform Act confirm that Congress intended that the guidelines, the abolition of parole, and the new good time rules would operate as a package. Thus, Congress delayed implementation of the parole and good time changes until the guidelines became effective, while at the same time it made the repeal of the Federal Youth Corrections Act immediately effective. Pub. L. No. 98-473, § 235, 98 Stat. 1837, 2031-34 (1984), as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 1728 (1985). Congress tied the effective date of the parole and good time changes to that of the guidelines in order to ensure that "the sentencing guidelines system will not replace the current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances" until the guidelines "replace the existing sentencing system." S. Rep. at 188-89; 1984 USCCAN 3371-72; 131 Cong. Rec. H11,998 (daily ed. Dec. 16, 1985) (statement of Rep. Gekas supporting extension of deadline for issuance of Sentencing Guidelines) ("[w]e do not want the parole process to die before the sentencing guidelines are created, so we stretch out the period of the life of the parole process to allow the Sentencing Commission work to be completed.") Accordingly, the Act retained parole and good time provisions "to deal with sentences imposed under current sentencing practices." S. Rep. at 189; 1984 USCCAN 3372.¹²

¹² In addition, the Sentencing Reform Act does not contain a severability clause, even though Title I of the Continuing Resolution, which immediately precedes the Comprehensive Crime Control Act, has such a clause. 98 Stat. 1975. Although the absence of a severability clause is not dispositive, *see Alaska Airlines, supra*, 107 S. Ct.

The purposes of the Sentencing Reform Act that were stressed throughout its legislative history reinforce the conclusion that Congress would not have separately enacted the changes in parole and good time. Thus, Congress had two interrelated goals in mind: eliminating disparities in sentences and establishing certainty in sentencing. S. Rep. at 38, 52; 1984 USCCAN 3221, 3235. The Senate Report makes it crystal clear that, to achieve these goals, Congress established a determinate sentencing system consisting of the sentencing guidelines, the abolition of parole, and the revision of good time rules. See 130 Cong. Rec. S531-32 (daily ed. Jan. 31, 1984) (statement of Sen. Thurmond, a co-sponsor of the Sentencing Reform Act); 128 Cong. Rec. 11,819 (1982) (statement of Sen. Baker); *id.* at 26,466 (statement of Sen. Thurmond); *id.* at 26,503 (statement of Sen. Kennedy).

Throughout the Senate Report, Congress identified the aspects of the current system that it sought to correct. First, Congress believed that both federal judges and the Parole Commission had too much sentencing discretion under the current system, which led to wide disparities in sentences that reflected neither the circumstances of the case nor any consistent purpose in sentencing. S. Rep. at 38 & n.6, 41-49; 1984 USCCAN 3221 & n.6, 3224-32. Thus, as the Senate Report stated, "[u]ntil the present sentencing statutes are changed . . . , judges and the Parole Commission are left to exercise their discretion to carry out what each believes to be the purposes of sentencing." S. Rep. at 40; 1984 USCCAN 3223. Second, parole decisions created uncertainty in sentencing, which was compounded by the constant adjustments of good time by prison officials and the duplication of effort and often inconsistent release dates resulting from parole and good time

at 1481, it is more significant than usual in this situation in light of Congress' inclusion of such a clause in another part of the crime bill and the importance of such clauses after the decision in *INS v. Chadha*, *supra*, which was issued a little more than a year before the Sentencing Reform Act was passed.

determinations. S. Rep. at 49-50, 57, 145-46; 1984 USCCAN 3232-33, 3240, 3328-29.

Congress wanted to improve upon the current model under which judges, the Parole Commission, and the Bureau of Prisons tried to lessen sentencing disparities by second-guessing each others' judgments and adjusting their own decisions accordingly. S. Rep. at 38-39, 49; 1984 USCCAN 3221-22, 3232. The Senate Report summarized both the problems with the current system and Congress' solution as follows:

By dividing the sentencing authority between the judge and the Parole Commission, however, current law actually promotes disparity and uncertainty. First, the dangers of unfettered exercise of discretion can occur at the time that an offender is released on parole as well as at the initial sentencing. For this reason, any *comprehensive plan* for reform should (1) take into account the division of authority that currently exists between the sentencing judge and the Parole Commission, (2) consolidate that authority, and (3) develop a system of sentencing whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called "good time."

S. Rep. at 46; 1984 USCCAN 3229 (emphasis added); *see also* S. Rep. No. 97-307, 97th Cong., 1st Sess. 959, 969-70 (1981).

In place of discretionary sentencing, the Sentencing Reform Act establishes a "comprehensive plan" for determinate sentencing, which is accomplished through the interplay of three separate, but interrelated, reforms: (1) the issuance of essentially mandatory sentencing guidelines; (2) the abolition of parole; and (3) the adoption of more limited and predictable good time credit rules. Congress made it clear that these three interrelated reforms were intended to be part of a package by expressly tying the abolition of parole and application of the new good time rules to the establishment of the guideline system, S. Rep. at 53-54 & n.74, 56; 1984 USCCAN 3236-37 & n.74, 3239, and by stating that: "The guideline sentencing system must totally supplant the indeterminate sentencing

system in order to be successful. Accordingly, all sentences to imprisonment under the new system are determinate." S. Rep. at 115; 1984 USCCAN 3298. Thus, under the guideline sentencing system:

A sentence imposed by a judge . . . will represent the actual period of time that the defendant will spend in prison, except that a prisoner, after serving one year of his term of imprisonment, may receive credit at the end of each year of up to [54] days per year toward service of his sentence if he satisfactorily complies with the institution's rules.

*Id.*¹³

Given the goals that Congress sought to achieve and the interrelationship between the three major reforms, it is inconceivable that Congress would have eliminated parole or revised the good time rules without establishing the primary element of a guideline sentencing system. The Senate Report makes it clear that the sentencing guidelines were the cornerstone of the determinate sentencing system, which Congress endorsed in its entirety, but not in its component parts. Thus, the abolition of parole and the new good time rules were considered essential to achieve determinate sentencing through the primary vehicle of sentencing guidelines, but were never defended by Congress as worthy ends in their own right. Instead, the coupling of the concepts was simply assumed. As one Senator put it, "[s]ince sentencing will take place in accord with stated and reviewable standards, there is no need for a parole commission to second guess the judicial sentence." 130 Cong. Rec. S411 (daily ed. Jan. 30, 1984) (statement of Sen. Hatch).

¹³ Rather than being hostile to the concept of parole, Congress envisioned that, after the guidelines system had been put into place, it would evaluate "whether the parole system should be reinstated in some form." S. Rep. at 56 n.82, 190; 1984 USCCAN 3239 n.82, 3373.

If the guidelines are invalid, but the abolition of parole and new good time rules are nonetheless put into effect, the Act would operate to increase disparities in sentencing and thereby frustrate Congress' principal goal. Before the Sentencing Reform Act, the Parole Commission had the power to reduce sentencing disparities by releasing individuals who had received abnormally harsh sentences early in their terms and by not releasing those who had been given more lenient terms of imprisonment. To a lesser extent, the Bureau of Prisons played a similar role in granting good time credits. But the abolition of parole in a non-guidelines system would give individual judges total discretion to determine the time that would be served. This result runs counter to Congress' unmistakable intent in the Sentencing Reform Act to constrain judges' discretion through sentencing guidelines and reduce sentencing disparities, since it would eliminate the primary checks on that discretion under the old system. Although the parole system was imperfect in many respects, Congress recognized that it had made major inroads in lessening sentencing disparities in the pre-guidelines system. S. Rep. at 164; 1984 USCCAN 3347. There is simply no basis to conclude that Congress would have eliminated the pre-existing mechanisms for lessening sentencing disparities without the core feature of the Sentencing Reform Act—the sentencing guidelines—and therefore produced a sentencing system that would not operate in a manner even remotely resembling what Congress intended under the guidelines.

CONCLUSION

For these reasons, the sentencing guidelines are unconstitutional and not severable from the parole and good time revisions of the Sentencing Reform Act.

Respectfully submitted,

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SENTENCING GUIDELINES—COMPARATIVE ANALYSES OFFENSES GROUPED BY BASE LEVELS*

Base Level	Offense	Adjustments (- / +)
43	First Degree Murder [2A1.1]	
	Unlawful Manufacturing, Importing, Exporting or Trafficking Drugs with Prior Drug Conviction [2D1.1]	+ 2
	Continuing Criminal Enterprises Involving Drug Offense—Leaders & Large Quantities of Drugs [2D1.5]	
	Treason Tamount to Waging War Against the U.S. [2M1.1]	
42	Gathering or Transmitting National Defense Information to Aid a Foreign Government—Top Secret Information [2M3.1]	

*This chart does not include attempt, solicitation, conspiracy, or aiding and abetting which have the same base level as the underlying offense. It also does not include accessory after the fact or misprison of a felony both of which start with, and then are adjusted from, the base levels for the given offense. Data in brackets refer to the guideline described.

Base Offense Levels for drug offenses depend on quantity and type of drug. The largest quantities and most serious drugs result in base levels as high as 36, with the less serious drug offenses at the lowest, highest and an intermediate base offense level to provide the various comparisons that pertain with respect to other offenses. We have placed ** next to the offense to indicate that we have divided the base level range accordingly.

Base Offense levels for tax offenses depend on the amount of tax loss. We have placed tax offenses in the chart at the highest and lowest base levels that are associated with the offense. We have placed *** next to the base levels for all tax offenses.

- 38 Continuing Criminal Enterprises Involving Drug Offense—2nd Offense [2D1.5]
 Unlawful Manufacturing, Importing, Exporting or Trafficking Drugs Resulting in Death or Serious Bodily Injury [2D1.1] +2
 Aircraft Piracy [2A5.1] +5
- 37 Gathering or Transmitting National Defense Information to Aid a Foreign Government—Not Top Secret Information [2M3.1]
- 36 Unlawful Manufacturing, Importing, Exporting or Trafficking Drugs ** [2D1.1] +2
 Involving Children Less than 14 in the Trafficking of Controlled Substances ** [2D1.2] +2
 Involving Children Ages 14-18 in the Trafficking of Controlled Substances ** [2D1.2] +2
 Distributing Controlled Substances to Individuals Younger than 21, to Pregnant Women, or Within 1000 Feet of a School or College ** [2D1.3]
- 35 Gathering National Defense Information—Top Secret Information [2M3.2]
- 33 Second Degree Murder [2A1.2]
- 32 Continuing Criminal Enterprises Involving Drug Offense—1st Offense [2D1.5]
 Destruction of War Material, Premises, or Utilities [2M2.1]
 Production of Defective War Material, Premises, or Utilities [2M2.2]

- 30 Unlawful Acquisition, Alteration, Use,
Transfer, or Possession of Nuclear Mate-
rial, Weapons, or Facilities [2M6.1] + 12
- Violation of other Atomic Energy Laws
 with Intent to Injure U.S. [2M6.2]
- Gathering National Defense Informa-
 tion—Not Top Secret Information
 [2M3.2]
- Intentionally Endangering Safety of Air-
 craft or Passengers [2A5.2]
- Disclosure of Information Identifying a
 Covert Agent, by Person with Autho-
 rized Access [2M3.9]
- 29 Transmitting National Defense—Top
Secret Information [2M3.3]
- Disclosure of Classified Cryptographic
 Information—Top Secret Information
 [2M3.6]
- Unauthorized Disclosure to Foreign Gov-
 ernment or a Communist Organization of
 Classified Information by Government
 Employee—Top Secret Information
 [2M3.7]
- Receipt of Classified Information—Top
 Secret Information [2M3.8]
- 27 Criminal Sexual Abuse; Attempt or
Assault with Intent to Commit Criminal
Sexual Abuse [2A3.1] + 18
- 26 Destruction of National Defense Mate-
rial, Premises, or Utilities [2M2.3]
- Production of Defective National Defense
 Material, Premises, or Utilities [2M2.4]

- 25 Voluntary Manslaughter [2A1.3]
 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material [2G2.1] + 2
 Disclosure of Information Identifying a Covert Agent, by Person without Authorized Access [2M3.9]
 Tampering or Attempting to Tamper with Consumer Products Involving Risk of Death or Serious Injury [2N1.1]
- 24 Transmitting National Defense—Not Top Secret Information [2M3.3]
 Kidnapping, Abduction, Unlawful Restraint [2A4.1] - 1/ + 18
 Tampering with Restricted Data Concerning Atomic Energy [2M3.5]
 Disclosure of Classified Cryptographic Information—Not Top Secret Information [2M3.6]
 Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee—Not Top Secret Information [2M3.7]
 Receipt of Classified Information—Not Top Secret Information [2M3.8]
 Knowing Endangerment Resulting from Mishandling Hazardous or Toxic Substances, Pesticides, or other Pollutants [2Q1.1]
 Involving Children Less than 14 in the Trafficking of Controlled Substances ** [2D1.2] + 2

- Involving Children Ages 14-18 in the Trafficking of Controlled Substances ** [2D1.2] + 2
- Distributing Controlled Substances to Individuals Younger than 21, to Pregnant Women, or Within 1000 Feet of a School or College ** [2D1.3]
- 23 Providing or Possessing Firearm in Prison [2P1.2] + 2
- Kidnapping, Abduction, or Unlawful Restraint—Demanding or Receiving Ransom Money [2A4.2]
- Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances [2D1.9]
- Use of Interstate Facilities in the Commission of Murder-for-Hire [2E1.4]
- Laundering of Monetary Instruments [2S1.1] + 16
- 22 Evasion of Export Controls—National Security or Nuclear Proliferation Controls Evaded [2M5.1]
- Engaging In, Inciting, or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention, Creating Risk or Death or Serious Bodily Injury [2P1.3]
- Exportation of Sophisticated Weaponry without Required Validated Export License [2M5.2]
- 21 Unlawful Manufacturing, Importing, Exporting, or Trafficking Drugs ** [2D1.1] + 2

20	Making, Financing, or Collecting an Extortionate Extension of Credit [2E2.1]	+ 13
	Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder [2A2.1]	+ 13
	Laundering of Monetary Instruments [2S1.1]	+ 16
19	Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations [2E1.1]	
18	Recklessly Endangering Safety of Aircraft or Passengers [2A5.2]	
	Robbery [2B3.1]	+ 20
	Extortion by Force or Threat of Injury or Serious Damage [2B3.2]	+ 19
	Obstructing an Election or Registration with Force or Threat of Force [2H2.1]	
	Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes [2K1.6]	
	Losing National Defense Information—Top Secret Information [2M3.4]	
	Tampering with Public Water System [2Q1.4]	+ 18
	Tax Evasion *** [2T1.1]	+ 4
	Non-Payment of Alcohol or Tobacco Taxes *** [2T2.1]	
	Evading Import Duties or Restrictions (Smuggling) *** [2T3.1]	
	Receiving or Trafficking in Smuggled Property *** [2T3.2]	

	Fraud and False Statements Under Penalty of Perjury for Taxes *** [2T1.3]	+ 4
	Aiding, Assisting, Procuring, Counsel- ing, or Advising Tax Fraud *** [2T1.4]	+ 6
	Failing to Collect or Truthfully Account for and Pay Over Tax *** [2T1.6]	
	Conspiracy to Impair, Impede or Defeat Tax *** [2T1.9]	+ 4
17	Willful Failure to File Return, Supply Information, or Pay Tax *** [2T1.2]	+ 4
	Burglary of Residence [2B2.1]	+ 11
	Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity [2S1.2]	+ 18
16	Renting or Managing a Drug Establish- ment [2D1.8]	+ 2
	Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Con- duct [2G1.2]	+ 8
	Providing False Information or Threaten- ing to Tamper with Consumer Products [2N1.2]	—
	Engaging In, Inciting, or Attempting to Incite a Riot Involving Persons in a Facil- ity for Official Detention Creating Major Disruption [2P1.3]	
15	Aggravated Assault [2A2.2]	+ 13
	Criminal Sexual Abuse of a Minor (Stat- utory Rape) [2A3.2]	+ 1
	Going In Disguise to Deprive Individual Rights [2H1.1]	+ 4

	Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination, if Injury Occured [2H1.3]	+ 4
	Peonage, Involuntary Servitude and Slave Trade [2H4.1]	
14	Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct [2G1.2]	+ 4
	Evasion of Export Controls other than National Security or Nuclear Proliferation Controls [2M5.1]	
	Exportation of Unsophisticated Arms, Munitions or Military Equipment or Services without Required Validated Export License [2M5.2]	
	Involuntary Manslaughter—Reckless Conduct [2A1.4]	
13	Conspiracy to Interfere with Civil Rights [2H1.2]	+ 4
	Structuring Transactions to Evade Reporting Requirement [2S1.3]	+ 18
	Involving Children Less than 14 in the Trafficking of Controlled Substances ** [2D1.2]	+ 2
	Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor [2G2.2]	+ 13
	Losing National Defense Information—Not Top Secret Information [2M3.4]	
	Providing or Possessing Weapons or Certain Narcotics in Prison [2P1.2]	+ 2
	Escape, Instigating, or Assisting Escape From Felony Conviction [2P1.1]	- 7/ + 17

Failing to Deposit Collected Taxes in
Trust Account as Required After Notice
*** [2T1.7]

Involving Children Ages 14-18 in the
Trafficking of Controlled Substances **
[2D1.2]

+ 2

Distributing Controlled Substances to
Individuals Younger than 21, to Pregnant
Women, or Within 1000 Feet of a School
or College ** [2D1.3]

12 Threatening Communications [2A6.1] - 4/ + 6

Burglary of Non-Residence [2B2.2] + 11

Use of Communications Facility in Com-
mitting Drug Offense [2D1.6]

Unlawful Interstate Sale and Transport-
ing of Drug Paraphernalia [2D1.7]

Receipt Possession or Transportation of
Firearms or other Weapons in Violation
of National Firearms Act [2K2.2] - 6/ + 5

Violent Crimes in Aid of Racketeering
Activity [2E1.3]

Engaging in a Gambling Business
[2E3.1]

Transmission of Wagering Information
[2E3.2]

Obstructing an Election or Registration
with certain fraud, theft, deceit, etc.
[2H2.1]

Obstruction of Justice [2J1.2] + 11

Perjury [2J1.3] + 11

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	Tampering with Consumer Products with Intent to Injure Business [2N1.3]	
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10	Engaging In, Inciting, or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention—without Risk of Death, Serious Bodily Injury or Major Disruption [2P1.3]	
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8	Bribery in Procurement of Bank Loan and Other Commercial Bribery [2B4.1]	+ 11
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(5) (8)
Nos. 87-1904 and 87-7028

Supreme Court, U.S.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

The United States Sentencing Commission was established by the Sentencing Reform Act of 1984 as "an independent commission in the judicial branch of the United States." 28 U.S.C. (Supp. IV) 991(a). It is a permanent body with seven voting members, at least three of whom must be federal judges. The members are chosen by the President with the advice and consent of the Senate, and they are removable by the President for cause. The primary function of the Commission is to develop binding determinate sentencing guidelines for the federal courts. The question presented by this case are:

1. Whether the sentencing guidelines are invalid because the Sentencing Commission is constituted in violation of separation of powers principles.
2. Whether the sentencing guidelines are invalid because the Sentencing Reform Act of 1984 improperly delegates legislative authority to the Sentencing Commission.
3. Whether, if the sentencing guidelines are struck down, the provisions of the Sentencing Reform Act abolishing parole and modifying the system of awarding "good time" credits to federal prisoners are nonetheless valid.

PARTIES TO THE PROCEEDINGS

The United States of America, John M. Mistretta, and Nancy L. Ruxlow were parties in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1904

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA

No. 87-7028

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (Pet. App. 1a-15a)¹ is reported at 682 F. Supp. 1033.

JURISDICTION

The judgment of the district court (Pet. App. 33a-40a) was entered on April 18, 1988. The notice of appeal (Pet. App. 41a-44a) was filed on April 19, 1988. The case was

¹ "Pet. App." refers to the petition appendix in No. 87-1904.

docketed in the court of appeals on April 22, 1988, as No. 88-1616WM (Pet. App. 45a-46a). The petitions in Nos. 87-1904 and 87-7028 for a writ of certiorari before judgment were filed on May 19 and 20, 1988, respectively, and were granted on June 13, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Articles I, II, and III of the Constitution of the United States and of the Sentencing Reform Act of 1984, 18 U.S.C. (Supp. IV) 3551 *et seq.* and 28 U.S.C. (Supp. IV) 991-998, are reproduced at Pet. App. 47a-85a.

STATEMENT

1. The Development of a Sentencing Guideline System.

Throughout the past century the federal government, like most states, has used a system of indeterminate sentencing. Statutes establishing the penalties for crimes typically gave sentencing courts broad discretion to decide whether offenders should be incarcerated and for how long, whether they should be fined and how much, or whether some lesser restraint, such as supervised probation, should be imposed instead of incarceration or a fine. The indeterminate sentencing system was complemented by the use of parole, under which offenders who were thought to be "good social risks" could be returned to society under the "guidance and control" of a parole officer. *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938).²

² An excellent survey of the sentencing schemes that preceded the Sentencing Reform Act of 1984, as well as a summary of Congress's work in developing the guideline system that was put into place by that Act, can be found in the amicus curiae brief submitted on behalf of the United States Senate. We will not here repeat the detailed treatment of the background that is set forth in that brief.

The indeterminate sentencing and parole systems were based on the "rehabilitative ideal"—the view that an important and realistic goal of sentencing was to rehabilitate the offender and minimize the risk that he would resume his criminal activities upon his return to society. Because the rehabilitative ideal required judges and parole officials to make sentencing and release decisions based on their assessments of the defendant's amenability to rehabilitation, trial judges and parole officials were necessarily given very broad discretion. Selecting an appropriate sentence involved "a discretionary assessment of a multiplicity of imponderables entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 812-813 (1961). Appellate courts believed that the trial judge "sees more and senses more" than they could, so the trial court's decision as to the appropriate sentence was virtually unreviewable on appeal. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 663 (1971). See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). Deciding whether to parole an inmate was also "predictive and discretionary" in nature (*Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)), and correctional officials enjoyed all but absolute discretion over that decision. See, e.g., *Rifai v. United States Parole Comm'n*, 586 F.2d 695 (9th Cir. 1978); *Brest v. Ciccone*, 371 F.2d 981 (8th Cir. 1967).

Over time, judges, legislators, correctional officials, and penologists came to be skeptical of the theory underlying indeterminate sentencing—that offenders could be rehabilitated in prison or in some other kind of correctional institution. By the 1970s a consensus began to emerge that rehabilitation was an unattainable goal in most cases, and that the system of indeterminate sentenc-

ing was producing intolerable disparities in sentences without a sufficient justification.³

The first major effort to reduce sentencing disparities in the federal system came through modifications in the parole system in the 1970s. In response to widespread criticism of its informal case-by-case method of making parole release decisions, the United States Board of Parole undertook an analysis of its prior release decisions in order to identify general parole policies and release criteria. In 1973, the Board devised a system of parole release guidelines that structured its discretion while retaining flexibility to deal with individual cases.⁴ The guidelines established a "customary range" of imprisonment for various classes of offenders by using a matrix combining a "parole prognosis" score based on the prisoner's personal char-

³ See, e.g., H.R. Rep. 1946, 85th Cong., 2d Sess. 6 (1958) (recommending creation of sentencing councils to reduce "widespread" disparities in sentencing); ABA, *Standards Relating to Sentencing Alternative and Procedures* (1969); K. Davis, *Discretionary Justice* 126 (1969); National Comm'n on Reform of Federal Criminal Laws, *Final Report* (1971); M. Frankel, *Criminal Sentences: Law Without Order* (1972); National Advisory Comm. on Criminal Justice Standards and Goals, *Task Force Report: Corrections* 418 (1973); N. Morris, *The Future of Imprisonment* 24-43 (1974); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810, 826 & n.82 (1975) ("Extensive social science research strongly suggests that rehabilitation—defined as an increasing likelihood of successful adjustment upon release—cannot be observed, detected, or measured."); D. Stanley, *Prisoners Among Us: The Problem of Parole* 50-66 (1976); *Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing* 98-100 (1976); P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977); A. von Hirsch & K. Hanrahan, *Abolish Parole?* 7-14 (1978). See generally F. Allen, *The Decline of the Rehabilitative Ideal* (1981).

⁴ 38 Fed. Reg. 31942-31945 (1973). The present parole release guidelines are codified at 28 C.F.R. 2.20 (1988).

acteristics, with an "offense severity" rating based on the characteristics of his offense.⁵

Three years later, Congress endorsed that approach and directed the newly created United States Parole Commission to use such a system of guidelines to govern its parole release decisions.⁶ In particular, Congress indicated that the Commission should base its release decisions in significant part on the nature and circumstances of the offense and the offender so as to achieve, as much as possible, "equity between individual cases and a uniform measure of justice." S. Conf. Rep. 94-648, 94th Cong., 2d Sess. 23, 25, 26 (1976). Thus, the role envisioned for the Parole Commission was, at least in part, "to moderate the disparities in the sentencing practices of individual judges." *United States v. Addonizio*, 442 U.S. 178, 189 (1979) (footnote omitted).

At the same time, Congress had under consideration a much more sweeping reform in the federal sentencing system—the creation of a system of sentencing guidelines that would go much farther than the new parole statute to restrict the broad discretion enjoyed by district judges in determining how long an offender would remain in prison. After considering the matter for more than a decade, Congress in 1984 enacted the legislation that is at issue in this case. The conclusions that Congress reached in the course of its exhaustive study of the subject are summarized in the Senate Report on the 1984 law. S. Rep. 98-225, 98th Cong., 1st Sess. 37-65 (1983).⁷

⁵ See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 391 (1980).

⁶ The Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219-231 (codified at 18 U.S.C. 4201-4218). See 18 U.S.C. 4203(a)(1) and 4206(a) (requiring the Parole Commission to maintain a guidelines system).

⁷ The House Judiciary Committee reached similar conclusions in its report, filed a year later on a bill that similarly proposed a wholesale

The Senate Report began with the recognition that the efforts of the criminal justice system to achieve the rehabilitation of offenders had failed dismally. S. Rep. 98-225, *supra*, at 38. The reason was that the theory of "coercive" rehabilitation" (*id.* at 40) was premised on "discredited assumptions" about the susceptibility of human behavior to change, especially in prison. *Id.* at 38. As the Report acknowledged, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Ibid.* Besides failing to achieve the goal of rehabilitation, the Report noted, the system of indeterminate sentencing had two "unjustified" and "shameful" consequences. *Id.* at 38, 65. The first was an "astounding" and "unwarranted" variation among the sentences imposed by different district courts on similarly situated offenders. The second was an intolerable lack of certainty about the period of time that an offender would spend in prison. *Id.* at 38, 41, 42-46, 65, 75, 112. Both problems were serious impediments to the evenhanded and effective operation of the criminal justice system.

The Senate Report noted that although the Parole Commission had sought to reduce unwarranted disparities in sentencing and to increase the certainty of a prisoner's release date (S. Rep. 98-225, *supra*, at 46), the parole system was inadequate to the task, for several reasons. First, the division of authority between the sentencing court and the Parole Commission contributed to uncer-

revision of the federal sentencing system. H.R. Rep. 98-1017, 98th Cong., 2d Sess. (1984). The House bill, which proposed a somewhat different sentencing guideline system, was rejected in favor of the Senate bill. Nonetheless, the House report is instructive because it indicates that the rationale underlying the sentencing reforms in the Senate bill was endorsed in the House as well.

tainty and resulted in "sentencing judges and the Parole Commission second-guess[ing] each other, often working at cross-purposes." *Id.* at 113. Second, the Parole Commission's guidelines failed to take into account certain factors that Congress regarded as particularly important in sentencing, such as "the amount of harm done by the offense, the criminal sophistication of the offender, and the importance of the offender's role in an offense committed with others." *Id.* at 48 (footnote omitted). Finally, the Parole Commission had only limited powers to adjust the sentences imposed by the courts: it often could not advance the offender's release to a date earlier than one-third of the imposed sentence; it could not increase sentences that were unduly lenient; and it had no authority whatever over persons who were not given a custodial sentence or were sentenced to a term of one year or less. *Id.* at 47.

The Senate Report concluded that the sentencing system required comprehensive reform that would (S. Rep. 98-225, *supra*, at 46 (footnote omitted)):

(1) take into account the division of authority that currently exists between the sentencing judge and the Parole Commission, (2) consolidate that authority, and (3) develop a system of sentencing whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called "good time."

The reform that Congress chose was the Sentencing Reform Act of 1984, Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

2. The Sentencing Reform Act.

The Sentencing Reform Act comprehensively revised the existing federal sentencing process in several ways.

First, Congress identified the purposes of criminal punishment. It rejected the use of imprisonment as a means of promoting rehabilitation (28 U.S.C. (Supp. IV) 994(k)) and stated that punishment should serve retributive, educational, deterrent, and incapacitative goals. 18 U.S.C. (Supp. IV) 3553(a)(2); see 28 U.S.C. (Supp. IV) 991(b).

Second, the Act consolidated the power exercised by district courts and the Parole Commission to decide what punishment an offender should suffer. The Act achieved that goal by creating the United States Sentencing Commission, directing the Commission to devise sentencing guidelines to be used by the district courts for sentencing, and prospectively abolishing the Parole Commission. 28 U.S.C. (Supp. IV) 991, 994, and 995(a)(1).⁸

Third, the Act made all sentences determinate. A prisoner would be released from custody at the completion of his sentence, less any "good time" credit that the prisoner could earn by good behavior while in custody. 18 U.S.C. (Supp. IV) 3624(a) and (b).

Fourth, the Act made the Sentencing Commission's guidelines binding on the courts, although it preserved discretion to depart from the applicable guideline in a particular case if the sentencing court found an aggravating or mitigating factor present that the guideline did not adequately consider. 18 U.S.C. (Supp. IV) 3553(a)-(b).⁹ The Act also required the sentencing court to state the reasons for the sentence it imposed and to give "the specific reason" for imposing a sentence outside the range indicated in the applicable guideline. 18 U.S.C. (Supp. IV) 3553(c).

⁸ The Parole Commission was to remain in office with jurisdiction over pre-guideline offenses until 1992, five years after the effective date of the guidelines. Pub. L. No. 98-473, § 235(b)(2), 98 Stat. 2032 (1984).

⁹ The Senate Report indicated that Congress expected that fewer than 20 percent of all sentences would fall outside the guidelines. S. Rep. 98-225, *supra*, at 52 n.71.

Fifth, the Act authorized limited appellate review of sentences. The Act permitted a defendant to appeal a sentence above the range defined by the applicable guideline; it permitted the government to appeal a sentence below the range defined by the guideline; and it permitted either party to appeal an incorrect application of the guidelines. 18 U.S.C. (Supp. IV) 3742(a), (b), and (c).

The sentencing guidelines were to be the centerpiece of the reforms introduced by the Act. They were to establish a range of determinate sentences for categories of offenses and defendants according to various enumerated factors "among others." 28 U.S.C. (Supp. IV) 994(b), (c), and (d). The ranges ordinarily could not vary by more than 25 percent from the minimum to the maximum, and all guideline sentences had to be within the limits provided in existing laws defining the punishment for the particular crime. 28 U.S.C. (Supp. IV) 994(a) and (b)(2).

Before settling on a mandatory guideline system, Congress considered and rejected several competing proposals for sentencing reform. For example, Congress declined to adopt a strict determinate sentencing system in which the sentences for particular crimes were fixed by legislation. Congress rejected that option because it believed that a guideline sentencing system would be successful in reducing sentencing disparities, while retaining the flexibility needed to adjust for unanticipated factors arising in particular cases. S. Rep. 98-225, *supra*, at 62; see *id.* at 78-79. The Senate Judiciary Committee also rejected a proposal that would have effectively made the sentencing guidelines only advisory by allowing a trial judge to depart from the guidelines whenever he found that doing so was warranted by the particular features of the case. *Id.* at 79, 423. The Committee rejected that proposal because voluntary guidelines had proved to be generally ineffective in the states that had used them. *Id.* at 79.¹⁰

¹⁰ See also S. Rep. 98-225, *supra*, at 52 n.71 (quoting National

3. The Sentencing Commission and the Sentencing Guidelines.

The Sentencing Reform Act created the United States Sentencing Commission to draft the sentencing guidelines and to review and modify them from time to time. 28 U.S.C. (Supp. IV) 991(o)-(u).¹¹ The Commission, which was designated as "an independent commission in the judicial branch of the United States," is a permanent body with seven voting members. At least three of the commissioners must be federal judges,¹² and no more than four members may belong to the same political party. The Attorney General or his designee serves as an ex officio, non-voting member of the Commission. 28 U.S.C. (Supp. IV) 991(a).¹³

Academy of Sciences, Panel on Sentencing Research, *Research on Sentencing: The Search for Reform* 29 (A. Blumstein *et al.* eds. 1983) (" '[w]ith voluntary guidelines, studies have found no evidence of systematic judicial compliance' ").

¹¹ Amendments to the guidelines take effect automatically unless, within 180 days after the amendments are reported, specific legislation provides otherwise. 28 U.S.C. (Supp. IV) 994(p). A defendant may file a petition requesting modification of the guidelines used in his sentencing on the basis of changed circumstances unrelated to the defendant. 28 U.S.C. (Supp. IV) 994(s). Although the Commission must consider such petitions, Congress has deleted the requirement in the 1984 Act that the Commission notify defendants in writing of its decision approving or disapproving such proposed modifications. Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1271. Thus, contrary to the assertion of amicus National Association of Criminal Defense Lawyers (Br. 3), the Commission does not have "adjudicatory power over petitions to modify the guidelines," but instead amends the guidelines in response to defendants' petitions in the same manner that it makes any other amendment to the guidelines.

¹² The judicial members of the Commission are not required to resign as federal judges while serving on the Commission. 28 U.S.C. (Supp. IV) 992(c).

¹³ In addition, during the five-year period before the Parole Commission expires in 1992, the Chairman of the Parole Commission will serve as an ex officio, nonvoting member of the Commission. See Pub. L. No. 98-473, § 235(b)(5), 98 Stat. 2033 (1984).

The members of the Commission are chosen by the President with the advice and consent of the Senate after the President considers a list of six judges recommended by the Judicial Conference of the United States. 28 U.S.C. (Supp. IV) 991(a).¹⁴ The members are removable by the President for good cause. *Ibid.* Otherwise, they serve six-year terms and may be reappointed once. 28 U.S.C. (Supp. IV) 992(a) and (b).

The Sentencing Commission took several steps to acquire the information necessary to devise guidelines that were consistent with the policies set forth in the Act. First, the Commission established a research program in order to analyze current sentencing and parole release processes. United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* 1.4 (1987); United States Sentencing Comm'n, *Supplementary Report On the Initial Sentencing Guidelines and Policy Statements* 16 (1987) [hereafter *Supplementary Report*].¹⁵ Second, as directed by Congress (28 U.S.C. (Supp. IV) 994(x)), the Commission held public hearings in order to hear from interested parties about the form that the guidelines should take. *Supplementary Report* 10-11, App. A, at 1-10.¹⁶ Third, the

¹⁴ Petitioner is wrong in stating (Br. 4) that the President must select from among the judges who are on the list prepared by the Judicial Conference. The President must consider that list, but nothing in the Act requires him to select from it.

¹⁵ The Commission "analyzed and considered detailed data drawn from more than 10,000 presentence investigations, less detailed data on nearly 100,000 federal convictions during a two-year period, distinctions made in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, public commentary, and information from other relevant sources." *Supplementary Report* 16.

¹⁶ The Commission heard testimony from 74 witnesses and received more than 550 written comments from various officials, interested organizations, and individuals. Numerous federal judges and several United States Attorneys testified before the Commission, as well as representatives from the Department of Justice, the American Civil

Commission met informally with several advisory and working groups to discuss sentencing policies and issues. *Id.* at 9.¹⁷ Finally, the Commission called on various federal agencies for information and met formally and informally with their representatives in order to discuss sentencing policy. *Ibid.*¹⁸

The Commission published a preliminary draft of sentencing guidelines in September 1986. It distributed copies to, and solicited comments from, all federal judges, United States Attorneys, Federal Public Defenders, Chiefs of the United States Probation Offices, defense lawyers, academics, researchers, and others. *Supplementary Report* 10-11. After considering those comments, the Commission published revised guidelines in January 1987, which were also widely distributed and subjected to the same analysis as the Commission's preliminary draft. *Id.* at 11. The Sentencing Commission promulgated the final guidelines on April 13, 1987, and issued a set of clarifying and technical amendments on May 1. The guidelines were then submitted to Congress for the six-month waiting period provided by the Act.¹⁹ No law was enacted postponing their effective date, and the guidelines went into

Liberties Union National Prison Project, the National Association of Criminal Defense Lawyers, the Federal Public Defenders Association, the Administrative Office of the United States Courts, the American Bar Association, the Vera Institute of Justice, and the District of Columbia Public Defenders Service. *Supplementary Report* App. A, at 1-10.

¹⁷ Those working groups included federal judges, United States Attorneys, Federal Public Defenders, state district attorneys, federal probation officers, private defense attorneys, academics, and researchers. *Id.* at 9.

¹⁸ Those agencies included the Department of Justice, the Bureau of Prisons, the Departments of Defense, Treasury, and Labor, and the Securities and Exchange Commission.

¹⁹ The submission and delayed implementation was required by Section 235(a)(1)(B)(ii)(III) of the Sentencing Reform Act (98 Stat. 2031-2032).

effect on November 1, 1987. They apply to crimes committed on or after that date.

The final sentencing guidelines employ a matrix that defines a sentencing range for every offense and uses a scoring system in which points are added or subtracted according to characteristics of the crime or the offender. The guidelines start by giving numerical values to offenses. They then provide for adjustments depending on factors such as characteristics of the crime or the defendant's role in committing it. The guidelines also permit a district court to depart from the guidelines when a case involves factors that have not been given adequate consideration by the Commission. See United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* (1987).

4. The Proceedings In This Case.

Petitioner was indicted in the United States District Court for the Western District of Missouri on three crimes arising out of the December 3, 1987, sale of cocaine to an undercover federal narcotics agent. Pet. App. 16a-18a.²⁰ He moved to have the sentencing guidelines held unconstitutional on the grounds that the Sentencing Commission was constituted in violation of separation of powers principles and that Congress delegated excessive authority to the Commission to establish the guidelines. The district court rejected petitioner's contentions. Pet. App. 1a-6a.²¹

The court rejected petitioner's delegation argument on the grounds that the Sentencing Commission is an Executive Branch agency and that its guidelines are similar to the

²⁰ Petitioner's co-defendant Nancy Ruxlow was indicted along with petitioner, but no judgment was entered as to her.

²¹ Because the claims presented by petitioner were identical to the claims raised by defendants in other cases pending in the same district, argument on petitioner's motion was presented to a panel of district court judges in the Western District of Missouri. Several judges joined in the opinion upholding the guidelines; one judge dissented.

substantive rules that are commonly promulgated by other such agencies. Pet. App. 2a-4a. The court also rejected petitioner's claim that the Sentencing Reform Act is unconstitutional because it requires three federal judges to serve on the Commission. *Id.* at 4a-5a. "Voluntary service of Article III judges in the Executive Branch is sanctioned by the history of judicial conduct as early as the Washington and Adams administrations, is not forbidden by the constitutional prohibition on dual service (applicable to members of Congress), and has continued occasionally from the Truman administration to date." *Ibid.* The court added that a contrary result "would deprive the Sentencing Commission of judicial insights in order to protect the independence of the judiciary," which the court found to be "a regrettable and unnecessary insistence on maintenance of functional purity." *Id.* at 5a.

Petitioner then pleaded guilty to conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846.²² He was sentenced pursuant to the guidelines to 18 months' imprisonment, to be followed by a three-year term of supervised release. Pet. App. 30a, 35a, 37a. The district court also imposed a \$1,000 fine and a \$50 special assessment. *Id.* at 31a, 40a.²³

²² On the government's motion, the district court dismissed the remaining counts in the indictment. Pet. App. 31a, 34a.

²³ Before sentence was imposed, petitioner moved to have the guidelines held invalid on the ground that they violated his asserted due process right to individualized consideration by a judge with unrestricted discretion in sentencing. Pet. App. 26a-27a. The district court denied the motion. *Id.* at 28a. Petitioner has not renewed that claim in this Court. Although the claim has been accepted by a few courts, see *United States v. Frank*, 682 F. Supp. 815 (W.D. Pa. 1988), appeal pending, No. 88-3220 (3d Cir.); *United States v. Bolding*, 683 F. Supp. 1003 (D. Md. 1988); *United States v. Ortega-Lopez*, 684 F. Supp. 1506 (C.D. Cal. 1988); *United States v. Brodie*, Crim. No. 87-0492 (D.D.C. May 20, 1988), it is plainly wrong. As this Court has noted, "in non-capital cases, the established practice of individualized sentences weighing mitigating and aggravating circumstances, rests

Although petitioner filed a notice of appeal, the case was not heard by the court of appeals. Instead, because of the importance of the issue, which will affect a large percentage of all the criminal cases that reach judgment in the federal system, both parties petitioned this Court for certiorari before judgment, and the petitions were granted.²⁴

SUMMARY OF ARGUMENT

I. Congress may authorize the Sentencing Commission to determine what punishment offenders should bear. That judgment is not a "core" legislative function that Congress itself must undertake. Congress's power to legislate in an area includes the power to delegate authority to an agency to implement the legislative policy. The Commission's authority to devise sentencing guidelines is similar to the power administrative agencies have to adopt regulations whose violation is a crime, or the power the Parole Commission had to fix release dates for inmates.

The Sentencing Reform Act provides detailed guidance to the Sentencing Commission about how it is to exercise its authority. Congress had previously defined the offenses and fixed the maximum penalties for federal crimes. In the Sentencing Reform Act, Congress defined the goals of punishment and directed the Commission to create

not on constitutional commands, but on public policy enacted into statutes." *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell & Stevens, JJ.); see *Gubiensio-Ortiz v. Kanahele*, Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988), slip op. 3-4 (Wiggins, J., dissenting).

²⁴ At the time the petitions were granted, there were a number of district court decisions, but no court of appeals decisions addressing the issues presented in this case. Recently, the Ninth Circuit, in a divided decision, invalidated the sentencing guidelines on separation of powers grounds. *Gubiensio-Ortiz v. Kanahele*, Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988). A decision from the Third Circuit is expected shortly.

guidelines that are consistent with those purposes, but that avoided unwarranted disparities while retaining flexibility for justified individualized differences. The guidelines were to be defined according to offense and offender characteristics largely specified by Congress. In addition, Congress instructed the Commission about the general appropriateness and length of terms of imprisonment for certain violent and narcotics offenses, for those who engage in a life of crime, for first offenders, and for those who aid in criminal investigations.

The Act is not flawed because the Commission may balance the factors it considers. Congress may leave to administrative judgment the relative weights of specified factors, and the decision as to what other considerations are relevant. The Parole Commission had that power in connection with release decisions, and its authority is not materially different from the power given to the Sentencing Commission. Each agency was given the power to decide how long an offender should be confined by balancing various considerations whose weight was left for the agency to decide.

II. A. The Sentencing Commission's authority to promulgate sentencing guidelines is an exercise of the executive power given to administrative agencies to adopt binding rules. The Executive has always had the authority to decide when a prisoner should be released by virtue of the commutation and parole powers. Under the Sentencing Reform Act, the judgment when a prisoner should be released is simply made at an earlier stage of the process and in a more formalized manner than under the indeterminate sentencing system. The Act also does not improperly combine prosecutorial and sentencing functions. The Sentencing Commission has no law enforcement authority, and district courts still impose sentence in each case.

B. Designating the Sentencing Commission as an entity in the judicial branch has no significance for separa-

tion of powers purposes. The powers and functions of the Commission are neither enhanced nor impaired by the "judicial branch" label, which is relevant only when determining whether laws applicable to the courts also apply to the Commission. In any event, the label cannot alter the nature of the power the Commission exercises, which is executive.

If the label is deemed to have constitutional significance, it can be severed. The Commission will function in the same manner with or without the label, and there is no reason to believe that Congress would have refused to implement the guideline system if the Sentencing Commission were denominated an Executive Branch agency.

C. The President's power to remove judge-commissioners is a virtue, not a vice, in the Act. No problem is presented by a law authorizing the President to remove officers that he appointed who exercise executive power. That three of the commissioners are federal judges does not call for a different result, because the Act only authorizes the President to remove the judges from their positions as commissioners, not from their positions as Article III judges.

D. Individual judges may serve on a commission that exercises the executive power. The text of the Constitution does not prohibit that practice, and federal judges have served in nonjudicial capacities since the nation's earliest days. The Sentencing Commission is not a court, and the judge-commissioners do not act as judges when devising sentencing guidelines. There is, accordingly, no risk that an Article III court will be asked to perform a nonjudicial function. The requirement that three commissioners be federal judges is not a flaw, because judges serve on the Commission voluntarily. Service on the Commission will not bias judges toward the government or create an appearance of partiality because of the nature of the Commission's work: Rationalizing the sentencing process is a

neutral undertaking closely allied to an historic judicial function, and recusal of the judge-commissioners in appropriate cases can avoid any possible perception of unfairness. The service of judges on the Commission also will not unduly interfere with the functioning of the judiciary because any disruption caused by recusal would be negligible and is vastly outweighed by the important contributions judges can make by their active participation in the Sentencing Commission's work.

III. A. The provision in the Act abolishing parole cannot stand if the Court rules that the sentencing guidelines are invalid. Parole was abolished because it became unnecessary once sentences were made determinate and the problem of disparity in sentencing was addressed by the guidelines. Abolishing parole without also instituting a guideline system, however, would have the opposite effect from the one Congress sought to implement through the Sentencing Reform Act: it would leave intact (or, more likely, increase) the existing disparities in sentencing, because there would be no effective mechanism for moderating the disparate sentences imposed by individual district court judges on different defendants. The abolition of parole was therefore inextricably tied to the guideline sentencing system.

B. By contrast, the provision modifying the award of "good time" credits to inmates should be severed. The Act retained the existing good time system with only three modifications. The Act altered the amount of credit that an inmate could earn, it vested credits once they were awarded to an inmate, and it required that a prisoner be informed about prison disciplinary rules before he could be penalized for their violation. The new good time system will function independently of the sentencing guidelines and in precisely the way Congress intended even if the guidelines are held invalid. The fact that the good time provision was set to go into effect at the same time as the

sentencing guidelines is not indicative of Congress's intention to link those two portions of the statute. Congress provided that almost every one of the many varied provisions of the Sentencing Reform Act would go into effect at the same time. Many portions of the statute, like the good time provision, have no direct relationship with the sentencing guidelines and clearly would have been intended to survive without respect to the fate of the guidelines.

ARGUMENT

I. THE SENTENCING REFORM ACT DOES NOT IMPROPERLY DELEGATE LEGISLATIVE POWER TO THE SENTENCING COMMISSION

Congress directed the Sentencing Commission to create and revise the sentencing guidelines because Congress believed that the problem of sentencing was too complex to be addressed solely through legislation. It was clear that generating a guideline system would require intensive study and the promulgation of hundreds of separate guidelines, together with dozens of offense and offender characteristics that would increase or decrease the sentence to be imposed in a particular case. In order for the guideline system to be effective, the guidelines would have to be reviewed constantly and modified in response to reports and experience from persons close to the criminal justice system. Therefore, instead of creating the entire guideline system, enacting it as legislation, and enacting modifications in the system from time to time, Congress chose a different course: it set out the policies that were to govern the guideline system and then delegated to the Sentencing Commission the task of generating, reviewing, and revising the particular guidelines in compliance with those statutory policies. That delegation was not only a sensible solution to the problem of generating a complex system of guidelines, but it was entirely consistent with the well-settled practice of delegating rulemaking authority to ad-

ministrative agencies, a practice that this Court has repeatedly upheld as essential to the efficient functioning of the federal government.

A. Deciding What Sentences Should Be Imposed For Particular Criminal Offenses Is A Function That The Legislature May Delegate To Other Entities

There is no general prohibition against Congress's delegation of its rulemaking authority in the area of sentencing. Contrary to the view of several of the district courts that have struck down the Sentencing Reform Act, sentencing is not a "core legislative field" in which any delegation is impermissible. *United States v. Brittman*, No. LR-CR-87-194 (E.D. Ark. May 27, 1988), slip op. 39-40; see also *United States v. Williams*, No. 3-88-00014 (M.D. Tenn. June 23, 1988), slip op. 25.

This Court has never invalidated a statute on the ground that certain "core" legislative functions are nondelegable. In fact, the Court has embraced the opposite proposition, stating that in general "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." *Lichter v. United States*, 334 U.S. 742, 778-779 (1948). As the court pointed out in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.), aff'd *sub nom. Bowsher v. Synar*, No. 85-1377 (July 7, 1986), attempting to determine which of Congress's enumerated powers is too important to be delegated would be an essentially standardless undertaking: "No constitutional provision distinguishes between 'core' and 'non-core' legislative functions," and any line attempting to distinguish among Congress's powers on that ground "would necessarily have to be drawn on the basis of the court's own perceptions of the relative importance of various legislative functions." 626 F. Supp. at 1385.²⁵

²⁵ The dissenting judge below seemed to take the even more extreme position that Congress may *never* delegate *any* legislative powers. Pet.

The Court has long held that Congress's authority to delegate its power extends to describing the conduct that will be subject to criminal sanctions. For example, in *United States v. Grimaud*, 220 U.S. 506 (1911), the Court concluded that Congress could authorize the Secretary of Agriculture to promulgate regulations whose violation was punishable as a crime. See also *United States v. Shapnack*, 355 U.S. 286 (1958) (upholding the constitutionality of the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates for federal enclaves offenses and sentences that are defined by state law); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding the constitutionality of a statute making violations of the Price Administrator's regulations a crime). Applying that principle, the courts of appeals have uniformly upheld statutes authorizing an Executive Branch agency to declare particular items unlawful, or to reclassify particular items in a way that makes their possession subject to enhanced penalties. See *United States v. Daniel*, 813 F.2d 661, 662-663 (5th Cir. 1987) (collecting cases) (approving delegation to Attorney General of authority to list controlled substances under the narcotics laws); *United States v. Hope*, 714 F.2d 1084, 1087 (11th Cir. 1983) (same); *United States v. Womack*, 654 F.2d 1034, 1036-1039 (5th Cir. 1981), cert. denied, 454 U.S. 1156 (1982) (approving delegation to Secretary of the Treasury of authority to list prohibited explosives). And in at least one instance, Congress has delegated to the Executive complete authority to designate the sentences that attach to particular offenses. See 10 U.S.C. 856 (delegating to the President the authority to establish maximum punishments for offenses under the Uniform Code of Military Justice).

App. 7a-14a (Wright, J., dissenting). Under that view, no regulation promulgated by an administrative agency could take effect without being enacted by the Congress after presentment to the President. That is certainly not the law. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984).

Besides lacking any support in the constitutional text or in this Court's precedents, the suggestion that sentencing is a "core function" that cannot be delegated runs afoul of 200 years of history. Far from being a function reserved to the legislature, the task of determining how long an offender should remain in prison has traditionally been shared by the courts and the parole authorities, subject to only very general directives from Congress. Thus, it is incongruous to refer to the Sentencing Reform Act as delegating legislative power, since the Act actually reflected an increase in legislative control over sentencing, not a decrease. Prior to the enactment of the Sentencing Reform Act, Congress had delegated the entire task of determining the length of sentences to district courts and the Parole Commission, subject in most cases only to the statutory limits on the maximum penalties that could be imposed. Petitioner does not suggest that the prior system involved an impermissible degree of delegation of legislative authority; indeed, petitioner urges that the Court should require a return to that regime. It is therefore clear that there is no special principle that imposes an absolute prohibition against the delegation of legislative authority over sentencing.

B. The Sentencing Reform Act Provides Sufficient Guidance To The Sentencing Commission To Avoid The Charge Of Excessive Delegation

Although petitioner does not embrace the broad position taken by some district courts that Congress may not delegate authority over sentencing at all, he argues (Br. 47-54) that the Sentencing Reform Act is invalid because it delegates legislative authority in an improper manner. According to petitioner, Congress did not define "an intelligible principle" (*J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)), to guide the Commission's judgment about the sentences that should be im-

posed in particular cases. For that reason, he argues, the delegation of authority to create and revise the sentencing guidelines is constitutionally invalid. In fact, the delegation at issue in this case falls comfortably within the principles of this Court's cases upholding congressional delegations of rulemaking authority to agencies outside the Legislative Branch.

The "nondelegation doctrine" is an expression of the principle that Congress cannot authorize the Executive to make the laws in the first instance, rather than to execute the laws Congress makes. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Field v. Clark*, 143 U.S. 649, 692 (1892). Nonetheless, delegations of rulemaking authority have regularly been upheld. Recognizing that Congress cannot by itself generate all the rules necessary for the governance of a complex society, the Court has held that the Constitution does not deny Congress "the necessary resources of flexibility and practicality, which will enable it to perform its assigned function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits." *Panama Refining Co. v. Ryan*, 293 U.S. at 421. It is "constitutionally sufficient," the Court has held, "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

In deciding whether that standard has been satisfied, the Court has been most reluctant to conclude that Congress has unconstitutionally yielded its power to another Branch. While the Court has insisted that Congress set forth the policies that are to direct the administrative action, the Court has recognized that "the degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is

not capable of precise definition." *Lichter v. United States*, 334 U.S. 742, 779 (1948). The Court has granted Congress broad latitude in deciding how much discretion should be left to designated agencies in exercising the rule-making authority granted to them by Congress, because "[t]he question of how far Congress should go in filling in the details of the standards which [the] administrative agency is to apply raises large issues of policy" (*Bowles v. Willingham*, 321 U.S. 503, 515 (1940)), on which Congress's judgment is entitled to great weight.

The Court has only twice invalidated a statute on grounds of excessive delegation, and in those cases the Court found that the statute at issue "declare[d] no policy" as to the subject matter of the delegation and left the Executive with "unlimited authority to determine the policy * * * as he sees fit." *Panama Refining Co. v. Ryan*, 293 U.S. at 415; see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In the case of every other challenge to legislative delegations, both before and after the *Panama Refining* and *Schechter Poultry* cases, the Court has upheld the delegation, even though in some cases the legislative statement of policy has been quite general and the discretion afforded to the administrative agency quite broad. For example, the Court has found sufficient specificity in legislation permitting the Executive to determine what constitute "excessive profits" (*Lichter v. United States*, *supra*); authorizing the Price Administrator to fix commodity prices at a "fair and equitable" level (*Yakus v. United States*, 321 U.S. at 423-427); permitting the Federal Power Commission to fix "just and reasonable" rates for natural gas (*FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944)); permitting the licensing of radio communication "as public interest, convenience, or necessity [requires]" (*National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943)); authorizing the establishment of maximum prices for coal "when in the

public interest" (*Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940)); and permitting the consolidation of interstate carriers when "in the public interest" (*New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932)).

The policy directives that the Court held sufficient in each of those cases were far less specific and detailed than the directives in the Sentencing Reform Act. In the case of the Sentencing Reform Act, of course, Congress made the most important policy choices when it defined the offenses and fixed the maximum (and sometimes the minimum) penalties for each of those crimes. Congress further channeled the Sentencing Commission's discretion by specifying, for the first time ever, the purposes it intended criminal sentences to serve and by directing the Commission to fashion the guidelines in a way that would satisfy those goals. 28 U.S.C. (Supp. IV) 991(b). Moreover, Congress expressed its overall intention that the guidelines should be designed so as to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," while at the same time "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." 28 U.S.C. (Supp. IV) 991(b)(1) (B).

Beyond those broad directions, Congress provided the Commission with detailed instructions about how the Commission should go about formulating the guidelines. The Commission was directed to use current average sentences as the starting point. 28 U.S.C. (Supp. IV) 994(m). Compare *Yakus v. United States*, 321 U.S. at 427. The Commission was then to devise guideline sentences based on a number of specified offense and offender characteristics. The range of permissible sentences for each combination of offense and offender characteristics could not be more than 25 percent of the total sentence or six

months, whichever was greater. 28 U.S.C. (Supp. IV) 994(b).

Congress set out each of the factors that the Commission was required to consider in establishing categories of crimes. 28 U.S.C. (Supp. IV) 994(c). Those factors included the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of harm caused by the crime; the community's view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a sentence might have on others; and the incidence of the offense in the community and the nation. 28 U.S.C. (Supp. IV) 994(c)(1)-(7). The Senate report on the legislation provided an explanation and elaboration of the purpose to be served by each factor. See S. Rep. 98-225, *supra*, at 170-171. For example, the report explained that the reference to the community's view of the gravity of the offense was "not intended to mean that a sentence might be enhanced because of a public outcry about a single offense," but "to suggest that changed community norms concerning certain criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense." *Id.* at 170. Those explanations supplied an important part of the "statutory context" that added to the specificity of Congress's mandate to the Commission. *American Power & Light Co. v. SEC*, 329 U.S. at 104-105.

Similarly, the Act directed the Commission to consider certain factors in establishing categories of offenders under the guidelines. 28 U.S.C. (Supp. IV) 994(d). Those factors included the offender's age, education, and vocational skills; his mental and emotional condition; his physical condition (including drug dependence); his prior employment record, his family ties and responsibilities, and his community ties; his role in the offense; his criminal history; and the offender's degree of dependence upon crime for his livelihood. 28 U.S.C. (Supp. IV)

994(d)(1)-(11). Once again, the Senate Report provided additional direction with respect to each of those factors. For example, the report stated that drug dependence "generally should not play a role in the decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for 'drying out,' as a condition of probation." S. Rep. 98-225, *supra*, at 173.

In addition, the Act furnished a number of other guideposts for the Sentencing Commission. The Commission was directed to ensure that the sentencing guidelines were entirely neutral as to the "race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. (Supp. IV) 994(d). The guidelines were also to reflect the "general inappropriateness" of considering certain factors that could serve as the proxy for forbidden considerations, such as a person's lack of employment, in imposing a sentence. 28 U.S.C. (Supp. IV) 994(e).

Congress directed the Commission to ensure that the guidelines require a term of confinement "at or near the maximum term authorized" for certain crimes of violence and narcotics offenses, particularly when committed by recidivists. 28 U.S.C. (Supp. IV) 994(h). It directed that a "substantial term of imprisonment" should be imposed on certain other defendants, such as recidivists, those who commit crimes as part of a pattern of conduct for which they earn a substantial portion of their income, those who pursue a pattern of racketeering activity, those who commit a violent crime while on pretrial or post-trial release, and those who commit certain narcotics crimes. 28 U.S.C. (Supp. IV) 994(i). The statute further stated Congress's view that it is generally inappropriate to imprison a first offender whose crime did not involve violence and was not otherwise serious. 28 U.S.C. (Supp. IV) 994(j). By con-

trast, the statute provided that it is generally appropriate to imprison a defendant for committing a violent crime resulting in serious bodily injury. *Ibid.* Finally, the statute required that the guidelines provide leniency for defendants who give substantial assistance to the government in the investigation of a crime. 28 U.S.C. (Supp. IV) 994(n).

Short of actually creating the entire guideline system by statute, it is difficult to imagine how Congress could have given the Commission more precise guidance than it did in the Sentencing Reform Act. As one court put it, the Act "outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." *United States v. Chambliss*, 680 F. Supp. 793, 796 (E.D. La. 1988). The combination of general and specific legislative instruction did far more than simply set forth an "intelligible principle" to guide the Sentencing Commission's discretion; it gave the Commission "the makings of a blueprint" for the guidelines. *United States v. Ruiz-Villaneuva*, 680 F. Supp. 1411, 1414 (S.D. Cal. 1988). Congress stated the reasons why the Act was adopted; Congress identified the goals of punishment; Congress instructed the Commission to adopt sentencing guidelines that would meet those goals; Congress restricted the range of sentences the guidelines could impose; Congress identified factors that the Commission must consider when devising sentencing standards; and Congress set forth specific directives to cover particular types of cases. Congress therefore identified "both the 'whither?' and the 'why?' of sentencing reform—the destination toward which the Guidelines should point and the reasons why that destination was chosen." *Id.* at 1417. Under this Court's precedents, that degree of congressional guidance is more than sufficient to overcome constitutional objections.²⁶

²⁶ That is particularly true in light of the "accumulated experience" (*Fahey v. Mallonee*, 332 U.S. 245, 250 (1947)) and "familiar[ity] with

Petitioner maintains (Br. 49-52) that the Act is invalid because it gave the Commission discretion to balance the various factors the Commission must consider and to rank federal crimes according to the Commission's view of their relative seriousness. This Court, however, has expressly held that Congress may leave to "administrative judgment * * * the relative weights to be given to [specified] factors," and to such " 'other relevant factors' " that the agency deems important, "instead of attempting the impossible by prescribing their relative weight in advance for all cases." *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 145-146 (1941); see also *Lichter v. United States*, 334 U.S. at 785-786 ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."); *Yakus v. United States*, 321 U.S. at 425 (statute may "call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework"). Regardless of whether the administrative agency acts by adjudication or by rulemaking, there is no constitutional requirement that Congress both declare the competing considerations that the agency is to apply and then assign those considerations relative weights that will dictate how they are to be applied in every case.

The functions of the Sentencing Commission are in many respects similar to the functions previously performed by the Parole Commission. Indeed, the similarity between the two agencies is quite damaging to petitioner's

[the] realities" of the criminal process (*American Power & Light Co. v. SEC*, 329 U.S. at 104) that the members of the Commission would bring to their task. See *Sunshine Coal Co. v. Adkins*, 310 U.S. at 390 ("Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purposes of the Act.").

case. The Sentencing Reform Act commits no greater degree of discretion to the Sentencing Commission than the federal parole laws had previously committed to the Parole Commission, within its jurisdiction, in deciding how long an offender should spend in prison. Congress authorized the Parole Commission to promulgate guidelines authorizing the release of an incarcerated offender "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," if release "would not depreciate the seriousness of his offense or promote disrespect for the law," and if release "would not jeopardize the public welfare." 18 U.S.C. (1982 ed.) 4206(a). Even though those standards obviously required the Parole Commission to assign weights to different factors and to resolve conflicts where the factors looked in different directions, the delegation of that authority to the Parole Commission has uniformly been upheld,²⁷ and petitioner does not question its lawfulness.

Petitioner attempts (Br. 53) to distinguish the example of the Parole Commission on the ground that the Sentencing Commission may create guidelines that increase the period of incarceration that a defendant would serve over the average sentence that was imposed for that offense in the past, whereas the Parole Commission could not increase the punishment imposed by the district court. It is unclear why that distinction makes any difference for purposes of the nondelegation doctrine. Congress has simply chosen different outer limits for the operation of the two

²⁷ See *Geraghty v. United States Parole Comm'n*, 719 F.2d 1199, 1208-1213 (3d Cir. 1983), cert. denied, 465 U.S. 1103 (1984); *Artez v. Mulcrone*, 673 F.2d 1169, 1170 (10th Cir. 1982); *Page v. United States Parole Comm'n*, 651 F.2d 1083 (5th Cir. 1980); *Moore v. Nelson*, 611 F.2d 434, 439 (2d Cir. 1979); *Hawkins v. United States Parole Comm'n*, 511 F. Supp. 460, 462 (E.D. Va. 1981), aff'd mem., 679 F.2d 881 (4th Cir. 1982); *Wilden v. Fields*, 510 F. Supp. 1295, 1302-1303 (W.D. Wis. 1981).

agencies' guidelines. The outer limits would be the same if Congress simply declared for one offense—or even for all offenses—that district courts should sentence offenders to the maximum statutory sentence for their crimes and that the Parole Commission would determine the release dates for the offenders by applying the parole guidelines. Surely the validity of the delegation to the Parole Commission would not suddenly come into question if Congress required district courts to impose fixed sentences or high minimum sentences.

Petitioner's remaining efforts to distinguish the sentencing guidelines from the parole guidelines are even less persuasive. Petitioner argues (Br. 52-53) that the parole guidelines were advisory and were adopted merely to guide the Parole Commission's individualized consideration of the eligibility of each prisoner for release. But under the Sentencing Reform Act, the district court must also consider each defendant individually (18 U.S.C. (Supp. IV) 3553(a)), and a court may depart from the guidelines if an aggravating or mitigating circumstance of the crime or defendant is present that the Sentencing Commission did *not* adequately consider. 18 U.S.C. (Supp. IV) 3553(b).²⁸ More importantly, for purposes of the nondelegation doctrine it does not matter whether the parole guidelines were "advisory" or whether they bound the Parole Commission. The point is that Congress delegated to the Parole Commission the responsibility for determining how long offenders should remain in prison. See H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 28 (1976) ("the weight assigned to individual factors (in parole decision making) [was] solely within the province of the (commission's)

²⁸ Significantly, Congress anticipated that the district courts would vary from the guidelines in no more than 20 percent of all cases because that was the percentage of cases in which the Parole Commission fixed release dates outside its guidelines. S. Rep. 98-225, *supra*, at 52 n.71.

broad discretion."). Congress has done the same thing in the Sentencing Reform Act, except that in the latter case Congress has provided much more detailed guidance as to the policies it wishes the agency to apply.

Finally, petitioner claims (Br. 53) that the parole guidelines are distinguishable from the sentencing guidelines because "Congress explicitly told the Parole Commission when a prisoner will be eligible for parole," whereas Congress gave the Sentencing Commission "*carte blanche*" to determine whether the various factors listed in the statute are relevant to the sentencing decision. That argument compares apples and oranges. Eligibility for parole simply meant that the Commission had the authority to grant parole, not that it was required to do so. An inmate who was eligible for parole had a right to be *considered* for release, not a right to release. Once the inmate became eligible, the decision whether to grant parole was "committed to [the Parole Commission's] discretion." 18 U.S.C. (1982 ed.) 4218(d). While the statutory restrictions on parole eligibility often required an inmate to serve some period of time before the Parole Commission acquired the authority to release him, see 18 U.S.C. (1982 ed.) 4205, the Parole Commission enjoyed broad discretion over whether to release him after he served that minimum period of time. Thus, the "eligibility" restriction on the Parole Commission's authority was no different from the restrictions imposed on the Sentencing Commission in the case of offenses carrying mandatory minimum sentences.

In sum, the Sentencing Reform Act represents an effort by Congress to play a greater, not a lesser, role in the sentencing process and to ensure that sentences will be equitable and will conform to a number of specified congressional policies. It is incorrect to suggest that, in its effort to narrow and rationalize the exercise of discretion previously enjoyed by the courts and the Parole Commission, Congress has suddenly become guilty of the sin of excessive delegation.

II. THE PROMULGATION OF SENTENCING GUIDELINES IS A PROPER EXERCISE OF EXECUTIVE POWER THAT MAY BE UNDERTAKEN BY THE SENTENCING COMMISSION

If Congress may leave to courts or the Executive the task of making more particular its general determinations regarding the appropriate punishments for crimes, the next question is whether the means Congress chose in the Sentencing Reform Act ran afoul of any constitutional prohibition. In our view, the Sentencing Reform Act granted to the Sentencing Commission the authority to exercise the executive power of Article II. That grant of authority is permissible because the structure, operation, and responsibilities of the Sentencing Commission are entirely consistent with the lawful exercise of that power.

A. An Administrative Agency's Promulgation Of Binding Rules Is A Traditional Exercise Of Executive Power.

Congress has often authorized executive officers to implement legislation by promulgating substantive rules or regulations that have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (citation omitted). See, e.g., *Bowen v. Yuckert*, No. 85-1409 (June 8, 1987), slip op. 6-7; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984); *Heckler v. Campbell*, 461 U.S. 458, 466-468 (1983); *Batterton v. Francis*, 432 U.S. 416, 425 (1977). That "quasi-legislative" undertaking is one example of the exercise of executive power. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Buckley v. Valeo*, 424 U.S. 1, 140-141 (1976); *Consumer Energy Council v. FERC*, 673 F.2d 425, 473-474 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 19, 66.

Congress entrusted the Sentencing Commission with the function of implementing through formal rules the pol-

icies set forth in the Sentencing Reform Act. The Commission thus performs a type of rulemaking function that has regularly been assigned to administrative agencies exercising the executive power.²⁹

The Executive has always possessed the authority to decide when a prisoner should be released and therefore to control the length of his confinement. The Constitution grants the President the authority "to grant Reprieves and Pardons" (Art. II, § 2, Cl. 1), which includes the power of commutation, without regard to minimum and maximum terms prescribed in legislation. *Schick v. Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855). Before the parole laws existed, the President exercised his clemency power with regularity. W. Humbert, *The Pardoning Power of the President* 116-122 (1941); *Annual Report of the Attorney General* 39-114 (1903). Since 1910, the Executive Branch has possessed the authority to release a prisoner on parole before the end of his term of incarceration, a power that "originated as a form of clemency," but over time came to be seen as "an extension of the sentencing process." S. Rep. 94-369, 94th Cong., 1st Sess. 15-16 (1975); see also H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 19-20 (1976); see *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on the imprisonment of convicted criminals.").

For purposes of determining what constitutional power is being invoked, the system implemented by the Sentencing Reform Act is not materially different from the system implemented long ago by the federal parole statutes. Under

²⁹ We agree with the Sentencing Commission and with petitioner that in creating the sentencing guidelines, the Commission is not exercising the "judicial power" of Article III, since it is not a court engaged in adjudication in the context of a particular "case" or "controversy." Art. III, § 2.

the sentencing guidelines, the determination when a prisoner should be released is made at an earlier stage of the process and in a more formalized manner than under the rules previously applied by the Parole Commission. But otherwise, the two statutory schemes are quite similar. In both cases, the administrative agency is exercising the authority to decide what term of confinement would best serve the goals of the criminal process and what criteria should be used to make that judgment. The exercise of the parole power, and the Parole Commission's power to promulgate guidelines governing release on parole, have always been regarded as executive in nature; the Sentencing Commission's exercise of its closely analogous power to promulgate enforceable sentencing guidelines is therefore appropriately characterized as an exercise of executive power.

No valid objection can be made that the executive power cannot be invoked, through different entities, both to pursue the prosecution of an individual and to set generally applicable guidelines that will govern his sentence. The Sentencing Commission does not perform or participate in any law enforcement or prosecutorial activities. Service on the Commission does not entangle the members of the Commission in law enforcement activities or imbue them with the perspective of the Executive Branch. The Commission's exercise of its authority to promulgate sentencing guidelines poses no greater threat of improper consolidation of prosecution and sentencing than did the Parole Commission's exercise of its authority as an independent agency within the Justice Department.

B. The Statutory Designation Of The Sentencing Commission As "An Independent Commission In The Judicial Branch" Does Not Compel A Different Conclusion.

1.—Petitioner's principal response to our argument that the Sentencing Commission is exercising executive power

is that our argument is contrary to the plain language of the Sentencing Reform Act, which places the Commission "in the judicial branch." That response does not address our point. The Sentencing Reform Act does not indicate what power it is that the Commission exercises, but merely identifies the "branch" with which the Commission is associated. The Constitution, however, does not speak of "branches" at all, but instead speaks of "powers." If the Commission is exercising executive power, as we believe it is, the only question of constitutional significance is whether the structure and function of the Commission are consistent with the exercise of that power. The designation of the Commission as an agency "in the judicial branch" may be of symbolic significance and may even affect the application of various other statutes to the Commission. But the "judicial branch" designation, standing alone, has no bearing on whether the Sentencing Commission may constitutionally exercise the power that it has been assigned. As one district judge put the point:

The legislative history makes clear that Congress intentionally sought to place the Sentencing Commission "in the judicial branch." However, to suggest that this label makes the Act, or the creation of the Sentencing Commission, unconstitutional, elevates semantics over substance. While "branch" is a convenient shorthand expression, the Constitution does not create "branches"; instead, it allots powers. * * * The label placed by Congress ("in the judicial branch") is constitutionally meaningless; instead, what must be examined are the function and powers of the Commission without the distraction provided by the label, which serves semantic purposes only.

United States v. Ortega-Lopez, 684 F. Supp. 1506, 1516 (C.D. Cal. 1988) (Hupp, J., dissenting).

Petitioner argues (Br. 38-39) that the "judicial branch" designation is significant because laws such as the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, and the Government in the Sunshine Act, 5 U.S.C. 552b, apply to the Executive but not the Judicial Branch. See 5 U.S.C. 552(f), 552a(a)(1), 552b(a)(1). That contention misses the point. The designation of the Commission as a "judicial branch" agency may well be relevant in determining, as a matter of statutory construction, whether Congress meant to exclude the Sentencing Commission from the coverage of those and similar laws. But Congress could have extended the same exemptions to the Commission directly, without reference to the Judicial Branch, and it would have raised no question as to the constitutional validity of the Commission's work. Thus, the effect of the "judicial branch" label on the applicability of various statutory provisions is a matter of no constitutional significance.³⁰

³⁰ One of petitioner's points (Br. 38-39) is that the label has significance because the President must include the figures from the Judicial Branch without change when he sends his budget to Congress. 31 U.S.C. 1105(b). Petitioner argues that (Br. 39) "[o]bviously, the power to alter the budget request of the Sentencing Commission is a matter of considerable significance." But petitioner fails to note that the relevant budget preparation provision, 31 U.S.C. 1105(b), which requires that the Judicial Branch proposals be included in the proposed budget without change, is not unique to the Judicial Branch. Nearly identical provisions apply to the International Trade Commission and the United States Postal Service. See 19 U.S.C. 2232; 39 U.S.C. 2009. Analogous provisions apply to the Commodity Futures Trading Commission, 7 U.S.C. 4a(h), the Consumer Product Safety Commission, 15 U.S.C. 2076(k), the Federal Aviation Administration, 49 U.S.C. App. 2205(f), the Interstate Commerce Commission, 31 U.S.C. 1108(f), and the National Transportation Safety Board, 49 U.S.C. App. 1903(b)(7), among other executive agencies. Moreover, 31 U.S.C. 1105(b) requires only that the President "include[]" the

Rather than suggesting some constitutional flaw in the Sentencing Reform Act, the special exemptions that "judicial branch" agencies enjoy from particular statutory obligations imposed on other federal agencies help to explain why Congress decided to place the Commission "in the judicial branch." In part, it appears, Congress intended by that designation to ensure that the Sentencing Commission would enjoy some of the same prerogatives that other Judicial Branch entities enjoy. See S. Rep. 98-225, *supra*, at 180. Indeed, quite apart from the reference to the Judicial Branch, the Sentencing Reform Act explicitly provides some of those protections for the Commission. See, e.g., 28 U.S.C. (Supp. IV) 996(b) (exempting employees of the Sentencing Commission from most provisions generally applicable to federal employees); 28 U.S.C. (Supp. IV) 995(a)(6) (permitting the Commission freely to enter into contracts for services necessary to the Commission's functions). Plainly, no constitutional issue is presented by Congress's decision to grant to the Sentencing Commission a dispensation from certain statutory obligations that are generally imposed on Executive Branch agencies.

To be sure, there is some evidence that Congress may have selected the "judicial branch" label in part because it was uncomfortable placing the Commission in the same Branch that is responsible for prosecuting criminal cases. See H.R. 98-1017, 98th Cong., 2d Sess. 95 (1984). But to the extent that the designation was intended to show that Congress intended the Commission to operate independently of day-to-day and policy direction from the President, Congress already sought to achieve that purpose by stating that the Commission is "independent" and by pro-

judiciary's budgetary proposals without change. For all agencies covered by Section 1105(b), the President is free to offer alternatives, or to comment upon budget proposals. Accordingly, the budgetary law hardly represents a basis for finding the "judicial branch" label affects the constitutional status of the Commission.

viding for Presidential removal for cause only.³¹ If that functional guarantee of independence is sufficient to satisfy any separation of powers concerns, the use of the "judicial branch" label is unnecessary. And if that functional guarantee of independence is insufficient, the use of the "judicial branch" label would do nothing to rescue the statute.

Finally, Congress used the reference to the Judicial Branch in part to signal that the Commission performs a function that directly assists and therefore requires close communication with the judiciary. Once again, however, the "judicial branch" label has no functional effect and therefore no constitutional significance. The provisions requiring courts to consult with and report to the Commission are set forth in other portions of the statute. The reference to the Judicial Branch does not in any way increase or decrease the authority of the Commission to perform those functions.³² In fact, perhaps the best demon-

³¹ The Commission's rejection of the Administration's proposals regarding the inclusion of provisions relating to the death penalty (see Pet. Br. 51) does not support petitioner's expression of concern about potential abuses of the President's removal power; to the contrary, the incident demonstrates that the Commission regards itself as independent, as the statute provides.

³² Petitioner suggests (Br. 39) that the Sentencing Commission is in some sense judicial because it is assertedly authorized by statute to issue orders to judges and judicial officers. The Sentencing Reform Act does instruct judges to submit written reports of sentences imposed to the Commission to assist in the gathering of information about sentencing trends and practices. 28 U.S.C. (Supp. IV) 994(w). That requirement, however, hardly confers on the Commission any authority over the judiciary or its members in the exercise of the judicial power. The Commission may also issue instructions to probation officers concerning the application of the sentencing guidelines. 28 U.S.C. (Supp. IV) 995(a)(10). Providing assistance to probation officers, who must prepare presentence reports with recommendations on the applications of the guidelines, cannot plausibly be characterized as an exercise of authority over or interference with the duties of

stration that the "judicial branch" label is more symbolic than functional is that Congress intended the Sentencing Commission to be independent of policy or other direction by the Chief Justice, the Judicial Conference, or any other judicial entity, unlike other agencies within the Judicial Branch, such as the Administrative Office of the United States Courts or the Federal Judicial Center.

In sum, the statutory reference to the Commission as being "in the judicial branch" is not inconsistent with our argument that the Commission was exercising executive power when it promulgated the sentencing guidelines. The question whether the Commission was exercising executive power is one that is resolved by looking at what the Commission does, not what it is called. Just as Congress could not assign executive power to a court simply by stating that when exercising that power the court would be deemed to be in the Executive Branch, Congress cannot render the exercise of executive power unlawful simply by referring to the agency that exercises it as an agency "in the judicial branch."

2. If the Court disagrees with us and agrees with petitioner that the reference to the "judicial branch" in the Sentencing Reform Act has constitutional significance and that the Act is thereby rendered unconstitutional, we submit that the label can easily be severed and the remainder of the Act upheld.³³ In *Alaska Airlines, Inc. v. Brock*, No. 85-920 (Mar. 25, 1987), this Court described the relevant inquiry. The Court noted first that no more of a statute

probation officers. In any event, it is not unprecedented for an agency other than a court to have authority over probation officers. The Parole Commission has long had express statutory authority to direct the activities of probation officers in supervising parolees. 18 U.S.C. 3655, 4205(e).

³³ Of course, if the Court upholds the statute on the ground proposed by the Sentencing Commission, it will be unnecessary to address the question of severability.

should be struck down than is absolutely necessary. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " Slip op. 5 (quoting *Buckley v. Valeo*, 424 U.S. at 108). In that regard, the inquiry is "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 6 (emphasis in original). Moreover, "the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion).

Under that standard, the reference to the "judicial branch" is plainly severable. The Commission will function in precisely the same way whether the reference to the "judicial branch" is included in the statute or not. Indeed, there is no indication in the statute or the legislative history that the reference to the "judicial branch" was critical to the achievement of the statutory purpose. The Senate Report stated that the Commission was placed in the Judicial Branch because it was intended that sentencing "should remain primarily a judicial function" and because sitting judges would be serving on the Commission. S. Rep. 98-225, *supra*, at 159, 163. But both of those goals were achieved by other provisions in the statute, and the reference to the "judicial branch" did nothing concrete to advance either one. Regardless of whether the reference to the "judicial branch" is included, the statute clearly contemplates that judges will have a major role in the activities of the Commission, in both an advisory and a reporting capacity, and through their participation as commissioners. And if we are correct, as we argue below, that there is no constitutional prohibition against judges serving on an agency that exercises executive power, the reference to the "judicial branch" is not needed to solve

that possible constitutional objection.³⁴

Petitioner charges that we are asking the Court to re-write the statute by "judicial reassignment" of the Commission from the Judicial Branch to the Executive (Br. 35-40) and characterizes this as an "unprecedented and unjustifiable request" (*id.* at 13). In fact, it would be far more unjustifiable for the Court to refuse to sever the "judicial branch" label and strike down a large segment of the Sentencing Reform Act, together with the work of the Sentencing Commission, because of the asserted constitutional difficulty raised by that single phrase. Since the statute and the legislative history make clear that Congress's principal concern was to effect the sweeping reforms contained in the Sentencing Reform Act, petitioner has failed to overcome the presumption in favor of severing a portion of the statute that may be constitutionally invalid, but was not essential to the operation of the statute as Congress intended. As in *Alaska Airlines*, slip op. 18, the Senate Report shows that the "emphasis during deliberations on the Act was placed overwhelmingly on the substantive provisions of the statute with scant attention paid to" the reference to the Commission's status as a Judicial Branch agency.³⁵

³⁴ The refusal of some courts to sever the language placing the Commission in the Judicial Branch on the ground that such a step "would appear to unduly frustrate Congressional intent" (*United States v. Arnold*, 678 F.2d 1463, 1470 (S.D. Cal. 1988); see *Gubiensio-Ortiz v. Kanahele*, Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988), slip op. 32)) focuses on the wrong issue. There is no question that Congress intended the Commission to be in the Judicial Branch. For severability purposes, however, the issue is whether it is clear that Congress would not have enacted the statute at all if it had realized that the invalid provisions would have to be omitted. *Alaska Airlines*, slip op. 5-6; *Chada*, 462 U.S. at 934; *Buckley v. Valeo*, 424 U.S. at 108; *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932).

³⁵ Although the Senate was the moving congressional force behind the legislation that was ultimately enacted, we note that a report on an

If the Court concludes, as we submit, that the Commission was exercising executive power, there are only two remaining constitutional objections that petitioner raises to the statute that must be addressed: the objection that it requires that federal judges serve as members of the Commission, and the objection that it authorizes the President to remove those judge-commissioners from the Commission. It is to those two remaining objections that we now turn.

C. The President May Be Authorized To Remove Judge-Commissioners From The Sentencing Commission

The Sentencing Reform Act authorizes the President to remove commissioners, including the ones who are federal judges, from the Sentencing Commission “for neglect of

earlier House bill on the same subject focused more on the placement of the Commission. See H.R. Rep. 96-1396, 96th Cong., 2d Sess. 489-490 (1980). That Report urged that the guidelines be promulgated by the Judicial Conference of the United States, a body composed entirely of judges (28 U.S.C. 331). One reason for that recommendation was that the House committee had doubts on separation of powers grounds about having an Executive Branch agency promulgate sentencing guidelines. The Committee also noted that assignment to the Executive Branch would “alter the relationship between Congress and the Judiciary with respect to sentencing policies and their implementation.” H.R. Rep. 96-1396, *supra*, at 490. See also H.R. Rep. 98-1017, 98th Cong., 2d Sess. 105-108 (1984) (proposing a Sentencing Guidelines Commission as an advisory body within the Judicial Conference). That policy concern was not heeded, since Congress ultimately placed responsibility not with the Judicial Conference but with a Commission subject to appointment and removal by the President. Accordingly, if severance of the “judicial branch” clause would solve the House committee’s other concern—the objection on separation of powers grounds—the House Report provides no reason to believe that the phrase “in the judicial branch” was of such central concern to Congress that it cannot be severed and the remaining portions of the statute upheld.

duty or malfeasance in office or for other good cause shown." 28 U.S.C. (Supp. IV) 991(a). Petitioner claims (Br. 32-35) that the removal provision is invalid, but there is no constitutional infirmity in a law that allows the President to remove officials that he has appointed to exercise executive power. Indeed, as petitioner appears to acknowledge, it is only if the Commission is seen as exercising judicial power that the removal provision would be in any way problematic.

The removal power granted to the President under the Sentencing Reform Act differs significantly from the removal power that Congress enjoyed under the statute at issue in *Bowsher v. Synar*, *supra*. In *Bowsher*, the Court held an Act of Congress invalid because it assigned executive power to the Comptroller General, who was removable only by Congress. By granting the Comptroller General executive power, the Court held, Congress had attempted to retain control over the execution of the law and thereby to intrude into the exercise of executive power in a manner expressly forbidden by Article II. As the Court noted, "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto," since "Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress." *Bowsher v. Synar*, slip op. 10-11. Because the Constitution does not allow Congress to implement policy without the bicameral passage of a bill and presentment to the President, the Court ruled, Congress could not retain for itself the power to remove an officer who exercises the executive power. *Ibid*. By contrast, under the Sentencing Reform Act it is the Chief Executive who is authorized to remove a member of the Sentencing Commission. Because the Sentencing Commission is exercising executive power, that removal power raises no separation of powers concern.

The removal provision in the Sentencing Reform Act also does not run afoul of this Court's analysis in *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); and *Morrison v. Olson*, No. 87-1279 (June 29, 1988). A separation of powers question arose in those cases only because Congress *restricted* the President's authority to remove officials who exercise executive power, not because a removal power was accorded in the first place.

The fact that three of the commissioners are federal judges does not call for a different conclusion. The President's removal power enables him only to remove the commissioners from their role as members of the Sentencing Commission and does not authorize the President to remove judge-commissioners from their positions as Article III judges. See *Gubiensio-Ortiz v. Kanahele*, Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988), slip op. 34 (Wiggins, J., dissenting) ("That the President can remove individuals as Commissioners in no way affects the performance of their judicial duties, because they can never have their salaries diminished or be removed as judges, except by impeachment."); see also *United States v. Alves*, No. 88-11MA (D. Mass. May 3, 1988), slip op. 14-15. The Act therefore poses no threat to the separation of powers, because it allows Article III courts to continue to adjudicate cases impartially, without any fear of domination by the executive.

D. The Constitution Does Not Forbid Congress From Requiring That Three Members of the Sentencing Commission Be Federal Judges

We have shown that the Sentencing Commission can perform an executive function without running afoul of any separation of powers concerns, because the members of the Commission are appointed by the President and

removable by him. Petitioner contends that even if we are correct in that regard, the statute is nonetheless flawed because federal judges cannot serve on the Commission under those terms. We submit, to the contrary, that the separation of powers principle is not violated in any way by the voluntary service of three federal judges on the Commission. Although nonjudicial functions may not be assigned to judges acting in their judicial capacity, there is no prohibition against judges serving voluntarily and in their personal capacity in extra-judicial roles.

1. Participation on the Sentencing Commission will not impermissibly interfere with judges' performance of their judicial functions.

There is no constitutional prohibition against permitting judges to serve as members of the Sentencing Commission. The text of the Constitution itself offers guidance on this issue. The Incompatibility Clause provides (Art. I, § 6, Cl. 2):

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

No similar restriction applies to judges. That omission is significant because a parallel clause that would have applied to the judiciary was proposed at the Constitutional Convention, but was not reported out of the Committee on Style.³⁶ The text of the Constitution thus suggests that

³⁶ 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 341-342 (rev. ed. 1966); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 129. The proposal at the Constitutional Convention would have added the following provision

the Framers did not intend to forbid judges from ever holding any executive positions.

History is also instructive on this point. Federal judges have served in nonjudicial capacities since the nation's first years.³⁷ In 1794, John Jay, the first Chief Justice of the United States, served also as Secretary of State and special envoy to England, where he negotiated the treaty that bears his name.³⁸ Oliver Ellsworth was both Chief Justice

to the Constitution: "No person holding the office of President of the U.S., a Judge of their Supreme Court, Secretary for the Department of Foreign Affairs, of Finance, of Marine, of War, or of —, shall be capable of holding at the same time any other office of Trust or Emolument under the U.S. or an individual State." 2 M. Farrand, *supra*, at 341-342. The Virginia Ratifying Convention also endorsed and forwarded to the First Congress a resolution drafted by George Mason providing that "The Judges of the federal Court shall be incapable of holding any other Office, or receiving the Profits of any other Office, or Emolument under the United States or any of them." III *The Papers of George Mason 1725-1792*, at 1057 (R. Rutland ed. 1970). The First Congress declined to endorse that proposal.

³⁷ See *In re President's Commission on Organized Crime (Scarfo)*, 783 F.2d 370 (3d Cir. 1986); *In re President's Commission on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985); Eisenberg, *A Consideration of Extra-Judicial Activities in the Pre-Marshall Era*, 1985 Yearbook Sup. Ct. Hist. Soc'y 117; Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193, 193-194 & n.3 (1953); McKay, *The Judiciary and Nonjudicial Activities*, 35 Law & Contemp. Probs. 9, 27-36 (1970); Murphy, *The Brandeis/Frankfurter Connection* 347-363 (1983); Slonim, *Extra-judicial Activities and the Principle of the Separation of Powers*, 49 Conn. B.J. 391 (1975); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123; Note, *Extrajudicial Activities of Supreme Court Justices*, 22 Stan. L. Rev. 587 (1970).

³⁸ Chief Justice Jay explained that there is a difference between the extrajudicial activities of a judge and the same type of actions by a court. As he wrote in a draft of a letter for President Washington, "[w]e are aware of the distinction between a Court and its Judges, and are far from thinking it illegal or unconstitutional, however it may be inexpedient, to employ them for other purposes, provided the latter purposes be consistent and compatible with the former." Draft of a

and Minister to France. Chief Justice John Marshall served briefly as Secretary of State during his term on this Court, and he was a member of the Sinking Fund Commission, which was given the responsibility of refunding the Revolutionary War debt.³⁹ More recently, in 1911 Justice Charles Evans Hughes accepted the invitation of President Taft to sit on a commission to establish second class postal rates. Justice Owen Roberts served on the commission investigating the disaster at Pearl Harbor. Justice Robert Jackson was the chief American prosecutor at the Nuremberg War Crimes Trials. Chief Justice Earl Warren presided over the commission investigating the assassination of President Kennedy. And other Members of this Court and the lower courts have also served on other executive commissions.⁴⁰ That long pedigree of

letter by Chief Justice Jay, intended for President Washington, enclosed with a letter from Jay to Justice Iredell (Sept. 15, 1790), reprinted in 1 G. McRee, *The Life and Correspondence of James Iredell* 293, 294 (1949).

³⁹ Act of Aug. 12, 1790, ch. 47, 1 Stat. 186. Although the debt funding plan was controversial. "[a]t no time in the debate" on its adoption "was opposition expressed to this 'further use' of the Chief Justice." Wheeler, *supra*, 1973 Sup. Ct. Rev. at 142. The First Congress also assigned to the Chief Justice the duty of inspecting the operation of the U.S. Mint. Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 250.

⁴⁰ The long list of instances in which Members of this Court have performed extra-judicial services are summarized in *Scarfo*, 783 F.2d at 377 & n.4; Mason, *supra*, 67 Harv. L. Rev. at 194 n.3, 200-201 n.19; and Note, *supra*, 22 Stan. L. Rev. at 590-592 & nn.14, 34 & 35. Examples of recent service by lower court judges on executive commissions include the following: Judge A. Leon Higginbotham, Jr., of the Third Circuit was appointed by the President to the National Commission on the Causes and Prevention of Violence. Exec. Order No. 12,435, 3 C.F.R. 202 (1983). Judges James Parsons and Luther Youndahl were members of the President's Commission on Law Enforcement and the Administration of Justice. Exec. Order No. 11,236, 3 C.F.R. 329 (1965). Judges George C. Edwards, Jr., James

service by the federal judiciary—beginning with the appointment by the President of the Constitutional Convention and first President of the United States of a contributor to *The Federalist*, appointments accepted by some of the earliest Members of this Court, and laws enacted by the First Congress—provides compelling evidence that the practice does not contravene the constitutional principle of separation of powers. See *Bowsher v. Synar*, slip op. 8 (decisions by First Congress, which included many of the Framers, provides “‘contemporaneous and weighty evidence’ of the Constitution’s meaning”); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc) (“considerable weight is to be given to an unbroken practice which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs”).

While the historical evidence by itself would not be conclusive, two early decisions of this Court provide substantial support for the view that the practice is constitutional. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792), involved a law empowering federal courts to resolve pension claims by disabled Revolutionary War veterans. The Act directed a circuit court to hear the evidence, decide the amount of disability pay due, and certify that amount to the Secretary of War, who had discretion to adopt or reject the court’s findings. This Court did not decide

M. Carter, A. Leon Higginbotham, Jr., and Thomas MacBride served on the National Commission on the Reform of the Federal Criminal Laws. *Reform of the Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 135 (1971). And Judge Robert W. Warren of the Eastern District of Wisconsin served on the Task Force on Organized Crime for the National Advisory Committee on Criminal Justice Standards and Goals. Task Force on Organized Crime, National Advisory Comm. on Criminal Justice Standards and Goals, *Organized Crime* xvii (1976).

whether a court could perform that task, since the law had been repealed, but the opinions of several Justices sitting on the circuit courts were reported in the margin of the Court's opinion. The Members concluded that a court could not undertake that duty, but some Justices believed that an individual judge might be able to do so as a commissioner.⁴¹ As this Court later explained, "the only question upon which there appears to have been any difference of opinion, was whether [the statute] might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions." *United States v. Ferreira*, 54 U.S. (13 How.) 40, 50 (1851).

Ferreira involved a law authorizing a federal district judge in Florida to resolve claims against the United States under the 1819 treaty with Spain that ceded Florida to this nation. The results of that *ex parte* proceeding were reported to the Secretary of the Treasury, who made the final determination whether to pay a claim. 54 U.S. (13 How.) at 45-47. The district judge decided that *Ferreira*'s claim was valid, and the United States appealed to this Court. The Court held that it lacked jurisdiction over the appeal, since the judge was not acting as a court, but as a commissioner, and therefore was not exercising the Article III judicial power. *Id.* at 47-51. In so ruling, however, the Court did not suggest that the statute in question was unconstitutional on the ground that it empowered a federal

⁴¹ See 2 U.S. (2 Dall.) at 410 n.† (Jay, C.J., Cushing, J., & Duane, Dist. Ct. J.) (individual judges could perform that function); *id.* at 411-412 n.† (Wilson & Blair, JJ., and Peters, Dist. Ct. J.) (not expressing an opinion on that question); *id.* at 413-414 n.† (Iredell, J., & Sitgreaves, Dist. Ct. J.) (leaving question open). See also *United States v. Yale Todd* (1794) (unreported decision discussed at *Ferreira*, 54 U.S. (13 How.) at 52-53).

judge to perform the function of resolving administrative claims. On the contrary, the Court concluded that the “law [in *Hayburn’s Case*] is the same in principle with the one we are now considering, with this difference only, that the act of 1792 imposed the duty on the court *eo nomine*, and not personally on the judges.” *Id.* at 50. Thus, the Court in *Ferreira* appears to have embraced the principle that an executive assignment to judges acting as a court would have been improper, but such an assignment to judges acting in their individual capacity would not. See *id.* at 50-51. The only potential flaw this Court saw in the Act in *Ferreira* was that, by designating the Florida judge as a commissioner, the statute may have violated the President’s Article II power to appoint the “officers” of the United States. *Id.* at 51. *Ferreira* therefore strongly implies that Congress may authorize a federal judge to perform an executive function.

The service of Article III judges on the Sentencing Commission is also consistent with Article III and separation of powers principles. The commissioners appointed by the President to serve on the Commission—whether selected because they are Article III judges or otherwise—do not act as judges when they collectively develop and promulgate sentencing guidelines. Their power to promulgate sentencing guidelines is administrative in nature and is derived from the enabling legislation establishing the administrative agency of which they are a part. The Commission is not a court, it does not function as one, and the judges who serve as commissioners are never called upon to exercise their judicial powers while serving in that role. Instead, the judges serve during their limited terms as administrators who lend their experience and expertise to its ongoing work. Judge-commissioners must be appointed by the President, just as any other commissioner must be

appointed (28 U.S.C. 991(a)), and they derive their power to act as commissioners solely from that presidential appointment, not from any authority they possess as Article III judges.

The Sentencing Reform Act therefore creates no risk that an Article III court will be required to perform a non-judicial function. Thus, this case is not similar to *Hayburn's Case* or *Ferreira*, in which an Article III court was asked to exercise the executive power. See *Morrison v. Olson*, slip op. 19 n.15. The Commission does not perform any judicial function that can be impaired by the assignment to it of nonjudicial, administrative responsibilities. The only impact of the Sentencing Commission's work on the judicial function arises from the participation of Article III judges as commissioners.

The fact that the Sentencing Reform Act *requires* that three members of the Sentencing Commission be drawn from the ranks of Article III judges does not change that result, because service on the Commission by any particular judge is voluntary. Cf. *In re President's Commission on Organized Crime (Scarfo)*, 783 F.2d 370, 378 (3d Cir. 1986); *In re President's Commission on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985) (Roney, J., specially concurring).⁴² The Act does not conscript

⁴² *Scarfo* and *Scaduto* involved challenges to subpoenas issued by the President's Commission on Organized Crime. The Organized Crime Commission was chartered to conduct a national analysis of organized crime and to make recommendations about ways to improve law enforcement efforts against organized crime and legislation to that effect. Exec. Order No. 12,435, § 2(a), 3 C.F.R. 202 (1983). The recipients of the subpoenas in *Scarfo* and *Scaduto* argued that the Commission violated the separation of powers because Judge Irving Kaufman was a member (and chairman) of the Commission.

In *Scarfo*, the Third Circuit held that Judge Kaufman's service on the Organized Crime Commission was not unconstitutional, for several reasons: the work of the Commission was nonjudicial,

judges onto the Commission. None of the current judicial members of the Commission was appointed without his consent, and there is no reason to believe that the President could require any judge to serve on the Commission if he did not wish to do so. In any event, to the extent that petitioner's constitutional claim is based on the possibility that some judge in the future may be compelled to serve on the Sentencing Commission against his will, petitioner cannot raise that claim in this criminal proceeding, since the current guidelines, and thus the sentence that was imposed on him, could not have been affected by the hypothetical possibility of Presidential conscription of a Article III judge at some time in the future.

The service of Article III judges on the Sentencing Commission will not bias those judges toward the government or undermine public confidence in the impartiality of the federal judiciary. That concern troubled the courts in the *Scarfo* and *Scaduto* cases, which involved the participa-

nonprosecutorial, and only advisory; service on the commission was voluntary; federal judges had historically served in nonjudicial posts; any risk that a judge who served on the commission would thereafter be partial to the government could be remedied through recusal; and the recusal of judges would not prevent the courts from discharging their Article III functions, since other judges could be substituted for the recused judges. 783 F.2d at 376-381.

The Eleventh Circuit in *Scaduto* ruled to the contrary in a divided decision that nonetheless upheld a contempt order for Scaduto's failure to comply with a subpoena. The Eleventh Circuit was concerned primarily with the risk that judges serving on the Organized Crime Commission could not thereafter maintain impartiality in cases involving organized crime and that the public and litigants might lose confidence in their impartiality. 763 F.2d at 1197. The court did not consider whether those risks could be avoided through recusal of the judges who sat on the Commission. Judge Roney concluded that the service of Article III judges on the Commission did not violate the separation of powers for the reasons later adopted by the Third Circuit in *Scarfo*. *Id.* at 1202-1206.

tion of federal judges on a commission seeking to improve enforcement efforts against organized crime. Unlike that enterprise, and in light of the statutory guidance that Congress gave to the Sentencing Commission, the Commission's function of developing rules that rationalize the sentencing process is entirely neutral and is not likely to lead judges to become partisans in criminal cases.⁴³ Although it is conceivable that the need to preserve the appearance of impartiality and the rights of defendants might require judicial commissioners to recuse themselves in some future cases involving challenges to sentences under the guidelines, the possibility of future recusals does not render their present service on the Commission constitutionally invalid.⁴⁴ Moreover, the possibility that the

⁴³ As one judge explained in upholding the guidelines (*United States v. Myers*, No. CR 87-0902 TEH (N.D. Cal. Apr. 11, 1988), slip op. 29): "Whether the eleventh [*Scaduto*] or the third circuit's [*Scarfo*] view on this question is correct, the instant case is distinguishable. The Commission is a different entity with a different purpose. The Sentencing Commission has not been authorized to assist the president in the fight against crime; instead, its purpose is a far more neutral one of rationalizing federal sentencing." See *United States v. Ruiz-Villanueva*, 680 F. Supp. at 1422-1423 (emphasis in original) (judicial service on the Sentencing Commission does not undermine the impartiality of the judiciary because "Congress created the Commission for the express purpose of *assisting* the judiciary in its sentencing function").

⁴⁴ It is by no means clear that recusal would be necessary in all criminal cases involving sentencing issues, and it is certainly not true that the independence of the Judicial Branch will be compromised by the appearance of judges reviewing the work of other judges. Otherwise, the judges who participated in drafting federal rules of procedure would be disqualified from deciding cases challenging those rules. This Court, however, has specifically rejected that argument. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (the fact that this Court promulgated the Federal Rules of Civil Procedure did not foreclose consideration of challenges to them by the Court). As one judge aptly stated, "[i]t is no secret that judges disagree with each other constantly. In construing or applying the guidelines,

participation of judges on the Sentencing Commission may lead to actual or perceived unfairness to defendants in future cases in which those judges sit is not a claim that petitioner can raise in challenging his conviction. He has been sentenced by a judge who was not a Commissioner, and his sentence is being reviewed by a Court none of whose members sat on the Sentencing Commission. If there is any flaw in permitting judges to sit on the Commission because of the possibility that future defendants may be prejudiced on account of the judges' service as commissioners, those defendants — not petitioner — are the proper parties to raise the objection.⁴⁵

Petitioner argues (Br. 45) that the voluntary inter-branch assignment of federal judges should be held invalid because "its logic contains no limiting principles" and could justify the assignment of law enforcement functions to a sitting judge. In fact, there are limiting principles on the permissible assignment of judges to nonjudicial tasks, and those principles are sufficient to answer the parade of horrors that petitioner proposes (Br. 45). The first question to be asked is whether a nonjudicial task is being assigned to a court *qua* court, or whether the individual judges serves voluntarily in a nonjudicial capacity. See *United States v. Ferreira, supra*. The second question to be asked is whether there is an inherent incongruity between the judge's assigned duties and his Article III responsibilities. See *Morrison v. Olson*, slip op. 17 & n.13.

federal judges are unlikely to be impressed, or even minimally affected, by the fact that other judges serve on the Sentencing Commission." *United States v. Chambless*, 680 F. Supp. at 800.

⁴⁵ We see no force to the argument made by the majority in *Gubiensio-Ortiz v. Kanahale, supra*, that appointment to the Commission might be perceived by the public as a reward to judges "for service particularly pleasing to the President." Slip op. 39. It seems unlikely that service on the Sentencing Commission would be viewed as so glamorous that the public would conclude that judges might alter their behavior in the hopes of being appointed to serve on the Commission.

The assignment at issue in this case satisfies both tests. Judges serve on the Commission in a nonjudicial capacity, and service on the Commission is not “inherently incongruous” with judges’ performance of their work as judges. The judges who serve on the Commission are not required to perform law enforcement responsibilities, as would be the case in petitioner’s hypothetical example of a federal judge assigned to serve as the head of the FBI. The Sentencing Commission exercises no law enforcement power; it performs no investigations; it files no charges. Instead, its purpose “is a far more neutral one of rationalizing federal sentencing.” *United States v. Myers*, No. CR 87-0902 TEH (N.D. Cal. Apr. 11, 1988).

In *Morrison v. Olson*, *supra*, this Court upheld as a proper exercise of power under the Appointments Clause, Art. II, § 2, Cl.2, the appointment of independent counsels by a Special Division of a United States Court of Appeals. The Court found no “inherent incongruity” between a court’s judicial function and its duty to appoint executive prosecutorial officers, both because judges are “well qualified” to select prosecutors as a result of their experience with prosecutors in criminal cases (slip op. 17 & n.13), and because recusal of the judges from any matter involving the prosecutors they appointed would fully protect against the risk or appearance of impartiality. *Id.* at 18. The same principles apply here. As the Senate Report noted, judges were regarded as especially well qualified to serve on the Sentencing Commission because of their intimate familiarity with sentencing—a much greater familiarity than judges are likely to have with the prosecutorial function. And, as in the case of the appointment of prosecutors, any appearance of impartiality can be avoided through recusal. Accordingly, we believe that petitioner’s “slippery slope” concerns are overstated. In the unlikely event that Congress should make any assignments of the type he describes, this Court will be

free to strike down those assignments on the ground that they are inconsistent with the performance of judicial functions.

2. Assigning judges to the Sentencing Commission will not unduly interfere with the functioning of the Judiciary.

The service of judges on the Sentencing Commission will not impair the ability of the federal judiciary to function-effectively.⁴⁶ Even if the judges who serve on the Commission must recuse themselves in cases involving challenges to the guidelines, those cases can be reassigned to other judges. The minor disruption that such reassignment would cause would hardly disable the judiciary from doing its work. Even if the judges who serve on the Sentencing Commission recuse themselves in some cases involving challenges to the guidelines, those judges can take on a greater share of other cases, so the total burden on the judiciary will not be increased by any recusals. Congress could properly conclude that the administrative burden of recusals is outweighed by the benefits of having judges participate in the generation and review of the sentencing guidelines. In particular, it was reasonable for Congress to determine that the vital contributions of expertise and wisdom to be made by the three judge-commissioners as active participants in the Sentencing Commission's work was necessary to accomplish the task of devising fair and reasonable sentencing guidelines. The alternative of having a judicial committee occasionally supply advice to the

⁴⁶ While it is true that, at least initially, service on the Commission consumed a substantial amount of the judicial members' time, the three judge-commissioners, Judges Wilkins, Breyer, and MacKinnon, have continued to perform their judicial duties while serving as Commissioners. As the court observed in *United States v. Chambliss*, 680 F. Supp. at 797, despite the fact that the Commission was established four years ago, there is no "empirical evidence which suggests that the functioning of the judiciary has been appreciably impaired."

Commission would be a less effective substitute for the regular service of the judge-commissioners in the day-to-day work of the Commission.

In any event, the possible disruption caused by guidelines-related recusals is likely to be minimal. There are at present 752 federal judges. Browson, *1988 Judicial Staff Directory* 554 (1987). Even a complete loss of three would represent only a 0.4 percent diminution in the judiciary's total work force. The actual effect will be much smaller, since the judge-commissioners would need to recuse themselves, if at all, only in that small fraction of cases involving challenges to the guidelines.⁴⁷ Of course, the number of judges who might need to recuse themselves will increase over time as the current and future members of the Commission complete their terms. 28 U.S.C. (Supp. IV) 992(a) and (b) (no commissioner may serve more than two six-year terms). The additional increase in the workload of other judges, however, is still likely to be negligible. A minor impact on the ability of the courts to handle their workload is not a sufficient basis to render invalid Congress's carefully crafted reforms.

In sum, there is no constitutional reason that judges cannot serve voluntarily and in their personal capacities on the Sentencing Commission. As the district court below held (Pet. App. 5a), a contrary result "would deprive the Sentencing Commission of judicial insight in order to protect the independence of the judiciary. This would be a regrettable and unnecessary insistence on maintenance of functional purity."⁴⁸

⁴⁷ Statistics prepared by the Administrative Office of the U.S. Courts also show that between 1982 and 1987 felony criminal cases constituted on the average only between 8 and 11 percent of the new filings each year for district court judges. *Federal Court Management Statistics 1987*, at 167.

⁴⁸ If the Sentencing Reform Act is held invalid on the ground that three judges must serve on the Commission, the guidelines should

III. IF THE SENTENCING REFORM ACT IS HELD UNCONSTITUTIONAL, THE PROVISION OF THE ACT ABOLISHING PAROLE MUST ALSO BE STRUCK DOWN, BUT THE PROVISION MODIFYING THE "GOOD TIME" CREDITS EARNED BY PRISONERS SHOULD BE UPHELD

Petitioner argues (Br. 54-60) that if the sentencing guidelines are invalidated, the provisions of the Sentencing Reform Act that abolish parole and modify the system for allotting good time to federal prisoners must fall as well. He argues that those provisions were intended to be part of a "comprehensive plan" for sentencing reform (Br. 58), and that if one part of the package is struck down, the remaining parts cannot be saved. For purposes of determining whether particular parts of a single statutory scheme are severable, however, the inquiry is not simply whether the parts were all intended to be part of a comprehensive whole, but whether Congress would have enacted the constitutionally valid portions of the law if it had known it could not enact those portions that the Court decides must be struck down. See *Alaska Airlines*, slip op. 5. Applying that test to the Sentencing Reform Act, we reach a somewhat different conclusion from that reached by peti-

nonetheless be given full effect under the "de facto officer" doctrine. Under that doctrine, a "person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *Untied States v. Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945); see also *Buckley v. Valeo*, 424 U.S. at 142-143; *Norton v. Shelby County*, 118 U.S. 425 (1886). That doctrine, "which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441-442. Thus, if the appointment of judges to serve on the Commission renders the Act invalid, the validity of the Commission's past administrative actions should not be affected. See *Buckley v. Valeo*, 424 U.S. at 143.

tioner. We agree with petitioner that if the sentencing guidelines fall, the provision of the Act that abolishes parole must be invalidated as well, because Congress would not have abolished parole if it had known that the sentencing guidelines would not survive. But we disagree with petitioner's contention that the same analysis applies to the provisions of the Act modifying the system of granting "good time" credit to federal prisoners. Those provisions can be upheld, we submit, because they can function quite independently of the sentencing guidelines system and were designed to serve purposes quite distinct from those served by the guideline system.

A. The Abolition Of Parole Was Inseparably Linked To The Promulgation Of The Sentencing Guidelines

Three components of the Sentencing Reforms Act were central to Congress's creation of a new mechanism for sentencing in the federal courts: (1) the sentencing guidelines, which were both determinate and mandatory; (2) the abolition of parole, a system of sentence adjustment that became unnecessary once all sentences became determinate and subject to universally applicable guidelines; and (3) a provision for appellate review of sentences not in conformity with the guidelines, which was designed to ensure that the guidelines were correctly applied and to establish a body of case law defining the circumstances in which courts could depart from the guidelines. S. Rep. 98-225, *supra*, at 46, 51-55, 151. Those three components were closely integrated and were designed to work together to effect the principal purposes of the Sentencing Reform Act—to reduce the disparity among sentences imposed on equally situated defendants and to make the sentences imposed closely approximate the sentences that defendants would actually serve. S. Rep. 98-225, *supra*, at 39.

It is clear that the system of appellate review of sentences that Congress devised (see 18 U.S.C. (Supp. IV)

3742) cannot function in the fashion Congress intended if the guidelines are struck down. The provision for appellate review of sentences is tied directly to the guidelines, so that only sentences falling outside the guidelines or resulting from a misapplication of the guidelines are subject to appellate review. The legislative history makes it clear that Congress did not intend to create a system of unrestricted appellate review of sentences, under which any sentence would be subject to appeal by either the defendant or the government, and in which there would be no benchmarks to guide the exercise of the appellate review function. See S. Rep. 98-225, *supra*, at 154.

The same analysis applies to the provision of the Act that abolishes the federal parole system, Pub. L. No. 98-473, § 218(a)(4), 98 Stat. 2027 (1984). Congress recognized that the parole system had some effect in mitigating the disparities among sentences, although it did not do enough in that regard. See S. Rep. 98-225, *supra*, at 46-47, 164 (the Parole Commission "is now able to alleviate some of the disparity among sentences in terms of imprisonment; however, it has no jurisdiction to eliminate disparity among decisions whether or not to sentence convicted defendants to terms of imprisonment"); H.R. Rep. 98-1017, *supra*, at 35 ("the Parole Commission has succeed[ed] in reducing much of the disparity in the amount of time served by those similarly situated; the decision whether to incarcerate, however, is still subject to disparity"); see also *United States v. Addonizio*, 442 U.S. at 189 ("Congress has decided that the [Parole] Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges."); S. Conf. Rep. 94-648, 94th Cong., 2d Sess. 19, 26 (1976).

Because the parole system was an inefficient means of addressing the problem of disparities in sentencing, Congress chose to supplant the parole system with the sentenc-

ing guideline system, a more effective vehicle for rationalizing sentences. But if the guideline system (including the appellate review process) is struck down and the provision of the Act abolishing parole is preserved, the result will be to increase the disparities among sentences, since there will be no check on the disparate treatment that similarly situated offenders could receive from different judges. That result would be fatally inconsistent with Congress's repeatedly stated intention to eliminate sentencing disparities in the federal courts. For that reason, we agree with petitioner that Congress would not have wished to abolish parole if the guideline system were not available to replace it.

B. The Revisions To The "Good Time" Laws Are Severable From the Remainder of The Act

Unlike the provision of the Act abolishing parole, the provision modifying the system for allotting "good time" credits to federal prisoners, 18 U.S.C. (Supp. IV) 3624(b), is not in any way tied to the sentencing guidelines, and it advances the purposes of the Sentencing Reform Act whether or not the guidelines survive. The new good time statute should therefore be upheld without regard to the fate of the sentencing guidelines.

Good time laws are designed to provide an incentive to prisoners to maintain good behavior while they are in custody. In the federal system prior to the effective date of the Sentencing Reform Act, a prisoner could earn good time allowances for good institutional behavior at a rate ranging from five to ten days per month, depending on the length of his sentence. 18 U.S.C. (1982 ed.) 4161. A prisoner could earn an additional three to five days of credit each month, called "industrial good time," for employment in a prison industry or camp, for "exceptionally meritorious service," or for "performing duties of outstanding importance in connection with institutional

operations." 18 U.S.C. (1982 ed.) 4162. A prisoner could forfeit all or any part of his accumulated good time credits if he committed an offense or violated institutional rules. 18 U.S.C. (1982 ed.) 4165. The Attorney General could restore whatever credit he deemed proper upon a recommendation of the Director of the Bureau of Prisons. 18 U.S.C. (1982 ed.) 4166. See S. Rep. 98-225, *supra*, at 146-147.

The Sentencing Reform Act changed prior law in three ways. First, it established a uniform maximum rate of 54 days per year of credit for all prisoners convicted of a felony, with the exact amount to be determined by the Bureau of Prisons. Second, the good time credits each prisoner earns each year vest at the end of that year. As a result, an inmate's violation of institutional rules can affect only the credits the inmate has earned during that year. Third, good time credit can be withheld only for the violation of institutional disciplinary regulations that have been approved by the Attorney General and provided to the prisoner. 18 U.S.C. (Supp. IV) 3624(b); S. Rep. 98-225, *supra*, at 147.

The enactment of the good time provision had nothing to do with the sentencing guidelines. The Senate Committee explained that the good time statute was amended in part because of "the complexity of current law," and the uncertainty it caused. In particular, under the former good time statute all or part of a prisoner's accumulated good time credits could be forfeited for a single disciplinary infraction. That system "increase[d] the uncertainty of the prisoner as to his release date, with a resulting adverse effect on prisoner morale." S. Rep. 98-225, *supra*, at 147. At the same time, the fact that lost good time was "usually restored" deprived the good time provisions of "the intended effect on maintaining prison discipline." *Ibid.* Congress concluded that permitting an inmate to earn credit toward an early release at a "steady," "sufficiently high,"

and "easily determined rate" will supply prisoners an "incentive for good institutional behavior" without carrying forward the uncertainty about his release date existing under prior law. *Ibid.*

The new good time provision serves each of those purposes quite independently of the fate of the sentencing guidelines. In addition, the new statute serves the overall statutory purpose of "truth in sentencing" by ensuring that the sentence imposed on an offender closely approximates the sentence he actually serves. See S. Rep. 98-225, *supra*, at 56. Accordingly, the background and purposes of the good time provision indicate that even if the guidelines are struck down, the new good time provision should be upheld.

Petitioner does not treat the status of the good time provision separately from the status of the provision abolishing parole. Instead, in contending that the abolition of parole and the new good time provision must stand or fall with the guidelines, he relies principally on the fact that Congress made the abolition of parole and the new good time provision effective at the same time that the new guidelines went into effect. But there is no particular significance in that. With only a few exceptions, Congress made every provision of the Sentencing Reform Act effective at the same time the guidelines went into effect. Yet the Act contains a wide variety of statutory changes, many of which have little or nothing to do with the guidelines. For example, the new statute revamps the procedures to be followed in granting and administering probation (18 U.S.C. (Supp. IV) 3561, 3563); it codifies the rules applicable to multiple sentences of imprisonment (18 U.S.C. (Supp. IV) 3584); it changes the law with respect to prison furloughs (18 U.S.C. (Supp. IV) 3622); it changes the law with respect to prerelease custody at the end of a prisoner's term (18 U.S.C. 3624(b)); and it makes changes in several

of the Federal Rules of Criminal Procedure, including Rule 6(e), which has nothing whatever to do with the sentencing guidelines (Pub. L. No. 98-473, § 215, 98 Stat. 2031 (1984)).

It cannot plausibly be contended that Congress would have wanted the entire Sentencing Reform Act, or at least the great portion of it that did not go into effect until November 1, 1987, to be declared invalid if the guidelines could not be upheld. Petitioner is thus clearly incorrect in attaching weight to the fact that Congress postponed the effective date of the good time provision until the guidelines became effective. Petitioner's point establishes that Congress devised a broad ranging package of sentencing reforms and wanted the reforms all to take effect simultaneously. But that is far from suggesting that if one of those reforms was found invalid, Congress would have wanted them all to fall. Rather than being inextricably bound up with the creation of the guidelines system, the good time statute is as independent as the provisions modifying the procedures for granting probation or prison furloughs. The new good time statute can therefore survive even if the sentencing guidelines must be struck down.⁴⁹

⁴⁹ Petitioner asserts in passing (Br. 60) that the former good time statute helped reduce sentencing disparities by granting early release to persons who had received especially harsh sentences. That was true only to the limited extent that the former good time statute automatically granted more good time credits to persons with longer sentences. Thus, under the former regime a prisoner with a five-year sentence would receive eight days of good time per month, while a prisoner with a ten-year sentence would receive ten days of good time per month. See 18 U.S.C. (1982 ed.) 4161. But that was only a minor and quite incidental effect of the graded good time schedule in the prior statute. Unlike the case with the parole system, there is no indication in the legislative history of the Sentencing Reform Act that the good time system was regarded as having any meaningful role in reducing sentence disparities.

CONCLUSION

The judgment of the district court should be affirmed.
Respectfully submitted.

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IN THE
Supreme Court of the United States

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**REPLY BRIEF FOR RESPONDENT/PETITIONER
JOHN M. MISTRETTA**

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**REPLY BRIEF FOR RESPONDENT/PETITIONER
JOHN M. MISTRETTA**

This reply of respondent-petitioner, John M. Mistretta ("petitioner"), is submitted principally to remind the Court of what the Department of Justice and the Sentencing Commission (referred to collectively as "respondents") did not discuss in their briefs, to point out the necessary implications of their arguments, and to respond to the few new arguments raised by them. Point I responds to the separation of powers arguments made in both respondents' briefs, which, in essence, urge the

Court to sustain the guidelines on the theory that Article III judges are not disabled from making the policy determinations made by the Commission so long as they do so in their "individual capacities." Points II and III deal with the delegation and severability arguments, which are made only in the Department's brief.

I. THE SENTENCING GUIDELINES VIOLATE SEPARATION OF POWERS.

Although not as clearly stated as in the lower courts, the necessary implication of the Department's position is that the function of issuing sentencing guidelines cannot constitutionally be performed by a body within the Judicial Branch, but only by Congress itself or by an Executive Branch agency. Thus, the Department's unstated premise is that if the Court cannot find some way around the statutory assignment of this function to the Judicial Branch, the guidelines are unconstitutional.

The Solicitor General's solution is to sever the phrase "in the Judicial Branch," or to disregard it, or to interpret the statute in a way that the phrase no longer has any constitutional significance, despite the fact that both Houses of Congress went out of their way to see that this function was assigned to the Judicial, rather than the Executive, Branch (Pet. Br. 37-38) ("opening brief"). While petitioner agrees with the Department's unstated premise, he believes that Congress' decision to place the Commission in the Judicial Branch cannot simply be disregarded for purposes of separation of powers for the reasons set forth in his opening brief at 35-46 and accepted by all three Ninth Circuit Judges in *Gubiensio-Ortiz v. Kanahale*, No. 88-5848, and *United States v. Chavez-Sanchez*, No. 88-5109 (August 23, 1988), including Judge Wiggins who voted to uphold the statute, but not on the

grounds urged by the Department. More importantly, even if the Court could properly rewrite the statute, the Act still would be unconstitutional because of the required presence of three Article III judges on the Commission. Before turning to the reasons why the service of Article III judges on the Sentencing Commission fatally flaws the process, there are two major omissions from respondents' briefs that warrant discussion: the nature of the judgments made by the Sentencing Commission and the impact of this Court's decision in *Morrison v. Olson*, 108 S. Ct. 2597 (1988), on this case.

A. The Judgments of the Sentencing Commission Involve Policy Choices That Are Constitutionally Inappropriate for a Body Within the Judicial Branch.

Petitioner's separation of powers argument focused on the nature of the decisions made by the Commission. As his opening brief pointed out, the Commission did not make individual sentencing adjudications, but laid down general principles of law applicable to all defendants. This distinction between "retail" and "wholesale" decisionmaking (*see Gubiensio-Ortiz, supra*, at 23 n.7), is not wholly missing from respondents' briefs, although the Sentencing Commission seems to argue that if judges can perform one activity, they must necessarily be able to do the other (Br. 35).

What is lacking is an acknowledgment of the type of decisions that the Commission made in establishing the guidelines. Starting with the averages of prior sentences, the Commission moved those averages up or down according to its own views of the relative seriousness of each crime. While it is true that it had some general suggestions from Congress, at least in the legislative history (*see Senate Brief 24-25; DiGenova Brief 24*), the statute

assigned the responsibility for making these policy choices to the Commission alone, and it made them, as it frankly admitted (*see* opening brief 8-12). Indeed, the whole ranking of criminal offenses by relative seriousness necessarily involved a series of "political" choices. We use "political" in the best sense of the word, since the Commission was striving to create guidelines that would embody the values of the community, as the Commission saw them, in selecting sentences appropriate for each type of crime and category of offender. And, as essentially mandatory guidelines, they affect the tens of thousands of persons who are sentenced each year in the federal system under them. In short, the Solicitor General is simply in error when he states that "the Commission's function of developing rules that rationalize the sentencing process is entirely neutral . . ." (Br. 54). Rather, as the Ninth Circuit put it, the Commission's statutory task involved "a variety of complex determinations that required the exercise of important policy judgments." *Gubiensio-Ortiz, supra*, at 22; *id.* at 23 (judgments reflect different "philosophies of criminal justice" and are "substantive decisions"); *id.* at 32 (Commission's functions are "quintessentially political in nature, requiring substantive policy decisions.")

This failure to acknowledge the value-laden nature of the determinations made by the Sentencing Commission shows up in another way. On several occasions the Commission argues that because the process relates to "sentencing," and because judges have been involved in sentencing for 200 years, there is nothing improper or incongruous about the Judicial Branch writing rules for sentencing. But "sentencing" involves not one, but several different activities, some of which are constitutionally appropriate for the Judicial Branch and some

inappropriate, just as is true for the Legislative and Executive Branches.

Thus, there is the act of setting a statutory maximum and minimum for each crime, a task which we assume (apart from delegation questions) the Commission does not believe that it could constitutionally perform, nor one that it believes could be properly assigned to the President or the Attorney General. On the other hand, there is the process of actually imposing specific sentences, from which Congress and the Executive are constitutionally disabled. In between is the process of deciding when parole should be granted, or whether good time credits should be allowed — tasks which can be shared, in the sense that Congress sets the general terms in the statutes, and the Executive Branch carries them out. While it is clear that Congress itself could not implement those statutes, in all probability the tasks of deciding whether to grant parole and/or how much good time has been earned, could be assigned to Article III judges, or to a commission within the Judicial, rather than the Executive Branch of government.

Writing sentencing guidelines, however, is a far different task from those that are or could be assigned to the Judicial Branch. The question presented in this case is whether a Commission in the Judicial Branch, including three Article III judges, may constitutionally perform that function, given the wide-ranging policy choices that the Commission had to make. That question cannot be answered by simply stating that the process involves sentencing, and therefore the Commission's assertion that "federal judges have been creating sentencing policy" for almost 200 years (Br. 16-17) disregards the fundamental differences between writing legislative-type sentencing rules and making individual sentencing determina-

tions. Rather, that question can only be answered by reviewing the work of the Commission and analyzing the types of choices it made, a task largely omitted by respondents in their analyses.¹

B. Respondents Overlook the Most Salient Portions of *Morrison*.

In *Morrison v. Olson*, *supra*, the Court upheld a statute permitting Article III judges, sitting as a Special Division of the United States Court of Appeals for the District of Columbia Circuit, to appoint independent counsel and to perform certain other tasks relative to that office. The first point of note is that the basis for the appointment authority exercised by the Special Division

¹ Although we believe that our brief was sufficiently clear on the point, we wish to emphasize again that we do not argue that the task of issuing guidelines is inherently executive, but only that it cannot be done by the Judicial Branch. *Accord*, *Gubiensio-Ortiz*, *supra*, at 33 n.8. While the Commission chides petitioner (Br. 2) for also objecting to assigning the task to the Executive Branch, his objection is not based on the functional incongruity at issue here, but on the problem of uniting the power to prosecute with the power to decide appropriate levels of sentencing. It is possible, under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), as reinforced by *Morrison v. Olson*, 108 S. Ct. 2597, 2616-22 (1988), that Congress might be able to create a Commission within the Executive Branch, with no federal judges as members, that might be sufficiently independent of the President and the Attorney General to avoid the merger of the prosecutorial and the sentencing functions. But Congress plainly did not do that here. For similar reasons, the Commission's argument (Br. 28-32) that the Act is not unconstitutional because it does not interfere with the function of the Executive Branch responds to a claim not advanced by petitioner. In any event, our claim here is that, however labeled, the issuing of sentencing guidelines is a function that is "more properly accomplished by" branches of government other than the Judicial Branch. *Morrison*, *supra*, 108 S.C. AT 2613.

was not Article III. Rather, the sole basis was the Appointments Clause, Article II, Section 2, Clause 2, which specifically allows courts of law to appoint inferior officers when Congress so provides. Since there are no comparable constitutional provisions for sentencing guidelines, and since Article III alone would not have supported that power and the related power to define the jurisdiction of the independent counsel, the portion of *Morrison* upholding those powers strongly suggests that Article III alone cannot be the basis for upholding the sentencing guidelines here.

Moreover, even though the power to appoint is explicitly provided for in the Constitution, this Court nonetheless placed an additional limitation on that power when exercised by Article III judges, *i.e.* the test of incongruity, which this Court read into the Appointments Clause to assure that fundamental principles of separation of powers remain intact. Therefore, in this case where there is no specific exception to separation of powers like the Appointments Clause, respondents must meet an even more stringent test in order to establish that Article III is not offended when Article III judges issue binding sentencing guidelines.

Furthermore, in applying that test, it is vital to look at what the courts have actually been allowed to do, consistent with Article III, and in that context, the distinction between substance and procedure, so derided by the Commission (Br. 17, 35-39), is instructive, even if not dispositive. The incongruity arises here not because the matter relates to sentencing, but because of the nature of the activities undertaken, *i.e.*, making the kinds of policy and political choices that are involved in making substantive rules, but not procedural ones. Indeed, even Judge Wiggins in his dissent in *Gubiensio-Ortiz*, *supra*, recog-

nized that “judges may not engage in substantive law-making” (dissent at 17). By way of contrast, in upholding the appointment power for independent counsel in *Morrison*, this Court noted that the independent counsel themselves have no role in making policy, 108 S. Ct. at 2608-09, nor does the Special Division make policy when it chooses an individual to serve as an independent counsel.

Finally, the most difficult aspect of the statute to justify in *Morrison* — that dealing with the shutting down of an independent counsel’s office — was not discussed in either respondents’ brief. This Court did not seek to construe the Appointments Clause broadly to justify that power. Rather, in order to save that statute, this Court adopted a very narrow interpretation of the power of the Special Division to close the independent counsel’s office to avoid problems of separation of powers. *Id.* at 2614-15. If that approach is required for a function like shutting down an office in order to stay within the limits of Article III, then in this situation, where the powers exercised by the Sentencing Commission are of vastly greater impact and involve political and other policy choices, *Morrison* makes clear that issuing sentencing guidelines is not a proper function under Article III.²

² The Sentencing Commission avoided this issue by observing that the Special Division was a special court and arguing that because the Commission is not a court, that part of the *Morrison* discussion is irrelevant (Br. 42-43 n.27). But the Special Division, which is created under 28 U.S.C. § 49, has no duties except with respect to independent counsels, and it was made a court solely to satisfy the specific requirement that appointments under the Appointments Clause can be made only by “courts of law.” Surely, the outcome would be no different here if Congress had called the Sentencing Commission a Sentencing Court, yet that is the import of the Sentencing Commission’s position. Similarly, the Commission uses the same approach on page 44 of its brief to avoid the problems created by the fact that the Article III judges on the Sentencing Commission are sharing their power with non-judges, suggesting that such sharing is proper on a commission, but not on a court.

C. There Are Sound Reasons, Rooted In Separation of Powers Considerations, Why the Sentencing Commission Cannot Issue Sentencing Guidelines.

No court has ever permitted functions like those assigned to the Sentencing Commission to be undertaken by a body within the Judicial Branch. Moreover, all of the authorities, especially *Morrison*, strongly argue against such an assignment. Indeed, even Judge Wiggins in his dissent in *Gubiensio-Ortiz*, *supra*, at 26-31, acknowledged that the cases relied upon to date, as well as the historic evidence and the argument based on the Incompatibility Clause, do not directly support the guidelines. Thus, it is difficult to understand how the Commission can legitimately claim that "settled distinctions" (Br. 15) allow Article III judges, sitting as a Commission within the Judicial Branch, to perform the kind of functions at issue here. In any event, petitioner does not rely on precedent alone for his separation of powers claim. Rather, the reasons contained in petitioner's opening brief at 44-46, and those set forth below, demonstrate that there are sound policy considerations, grounded in principles of separation of powers, why the Sentencing Commission, which is required to have three Article III judges as members, cannot constitutionally issue binding sentencing guidelines.³

³ The Commission chides petitioner on several occasions (Br. 2, 15) for interchangeably using "Judicial Branch," "federal courts" and "federal judges." The reason for the mixed usage is that the Commission itself is a mixed body because Congress made it that way. Thus, Congress specifically placed the Commission in the Judicial Branch, as the Commission itself recognizes and indeed embraces, and hence it can hardly be unfair for petitioner to describe the Commission that way. Congress also required three Article III judges to serve on the seven-member Commission, and so when describing what is being done, it is hardly unfair to describe the activities as those of Article III judges or federal judges. Furthermore, in explaining the limita-

The implications of upholding the Commission's powers can be seen by asking whether it would be constitutional for Congress to have assigned the power to issue sentencing guidelines to this Court, presumably with a staff and an advisory committee for assistance. While not directly acknowledging it, the Solicitor General's brief can only be read as conceding that such a scheme would be unconstitutional, but that this Act is saved because the Commission can be treated as part of the Executive Branch, with the judges merely serving in their individual capacities. The Commission is more oblique, saying that it is not functioning as a court (a claim that petitioner does not dispute), and then arguing that it is constitutional to assign the function of issuing sentencing guidelines to a body within the Judicial Branch, so long as this body is not acting as a court. There are several reasons why those arguments cannot be accepted.

Although the Sentencing Commission suggests that petitioner has approached the separation of powers questions in an overly formalistic way, in contrast to its own "pragmatic" and "flexible" approach (Br. 26), it is respondents against whom the charge of formalism is more properly directed. If judges may not constitutionally issue sentencing guidelines when their organizational designation is a "court," what reason can there be, consistent with the purposes of separation of powers, to allow them to do so when their organizational designation is a "commission?" Either the nine members of this Court may constitutionally issue binding sentencing guidelines, or they

tions imposed by Article III in *Morrison*, *supra*, 108 S. Ct. at 2611-13, this Court used the terms "judges," "judiciary," and "Judicial Branch" interchangeably. See also *id.* at 2613-14, using "courts" and "judges" synonymously.

may not, but no purpose underlying the doctrine of separation of powers could possibly be served by allowing Supreme Court Justices to issue sentencing guidelines on the condition that they do so only in their "individual capacities." Surely, there is more to the limitations of Article III than a rule that they apply only when judges purport to be deciding cases or controversies. Accordingly, since Congress required Article III judges to serve on the Commission and perform an official governmental function, there is simply no merit to the claim that they are serving on the Commission in their individual capacities, let alone that such service saves the guidelines.⁴

Perhaps the principal reason why issuing sentencing guidelines is not a proper function for Article III judges is that it threatens their impartiality and that of the entire federal judiciary. Federal judges are supposed to interpret the law, and not create it. By adhering to that restriction, they avoid entering the political struggle that lawmaking entails. That avoidance is necessary to maintain their impartiality and the inevitable spill-over effect on the public's perception of the federal judiciary when even a few federal judges step outside their constitutionally assigned roles. Thus, the very act of expanding judicial powers through the making of sentencing policy inevitably detracts from the primary mission of the judiciary because it reduces the appearance of impartiality that is so essential to public confidence in the federal judiciary.

⁴ Service in a judge's "individual capacity" would have meaning in a context in which the judge wished to be an officer of, for example, a religious or civic organization or a private university, since such officers are not performing a governmental function and there is no legislative requirement that their positions be filled by an Article III judge.

There is another, closely-related reason why judicial service on the Sentencing Commission undermines separation of powers. Placing judges on the Commission may provide some expertise (although here none of the three judges here had any significant experience in sentencing), but it provides something more: an air of neutrality, a patina that the Commission's decisions are the impartial product of judicial expertise, rather than the result of political judgments involving fundamental policy choices between competing value schemes. See *Gubiensio-Ortiz*, *supra*, at 40-44. But when the cover of what the Sentencing Commission actually has done is removed, and it is recognized that the Commission decided what offenders go to jail and for how long, and what kinds of crimes and offenders deserve probation, then it becomes plain that the work of the Commission has thrown three Article III judges into the political arena which separation of powers makes off-limits to them. Therefore, in the words of *Morrison*, those functions are "more properly accomplished by [the other two] branches." 108 S. Ct. at 2613.

It is true that, in terms of the loss of judgepower, three judges is not a devastating reduction. But, of course, if this Commission is upheld, others will surely follow on its heels as a device for resolving other intractable political problems. See *Gubiensio-Ortiz*, *supra*, at 50. However, the loss of three judges is not the heart of the problem. Rather, it is the loss of the appearance of judicial neutrality and impartiality, which are the *sine qua non* of an effective federal judiciary. Yet embroiling Article III judges in creating sentencing policy, whether as part of a Judicial Branch commission, or as part of a body actually assigned by Congress to the Executive Branch, can only serve to undermine that impartiality and hence to reduce the respect and powers of persuasion that the federal

judiciary must have in order to carry out its constitutional function.

Congress recognized that the Commission would be making political judgments and forbade more than four members from being members of the same political party. 28 U.S.C. § 991(a). Congress was, of course, correct in its expectation that the Commission would engage in political determinations, but as the Ninth Circuit recognized in *Gubiensio-Ortiz, supra*, at 50, that is precisely why this Commission, as presently constituted, cannot perform the functions assigned to it under principles of separation of powers.⁵

There is another perspective from which it is incongruous to allow judicial judges, even in their "individual capacities," to make the kind of substantive, political judgments involved in creating sentencing guidelines. As this Court observed in *INS v. Chadha*, 462 U.S. 919, 951 (1983), the Framers established "a single, finely wrought and exhaustively considered, procedure" for making those kinds of judgments, *i.e.*, the concurrence of both Houses of Congress and the President or two-thirds of both Houses over the President's objection. To allow the Sentencing Commission to issue guidelines offends that procedure in two respects. First, the checks and balances of the mandatory involvement of three units of government is lacking when only a single body, like the Sentenc-

⁵ Respondents rely heavily on the history of extra-judicial service by Article III judges to defend the Commission. While we believe that the circumstances of many of those examples differ markedly from this case, the most important factor distinguishing them is that none of them has been subjected to judicial scrutiny by this Court under principles of separation of powers as they have come to be interpreted since *Buckley v. Valeo*, 424 U.S. 1 (1976). *Accord, Gubiensio-Ortiz, supra*, dissent at 26-31; *see also* opening brief 41-42.

ing Commission, makes such decisions. Second, unlike Congress and the President, who are elected by the people, members of the Sentencing Commission are appointed for terms of six years and will never have to stand for election or re-election. And, in the case of the members who are federal judges, they have lifetime positions to which they can return even if they invoke the displeasure of the public. These two factors, therefore, further demonstrate that the Commission represents an erosion of our democratic principles and constitute another reason why issuing sentencing guidelines is a task suited for the Legislative or perhaps Executive Branch, but surely not for Article III judges.

Finally, neither respondent addresses the additional problem created by the fact that federal judges are in a minority on the Commission. As a result, Article III judges are forced to share their substantive, and not merely advisory, power with non-judges, a situation which is contrary to this Court's warning in *United States v. Nixon*, 418 U.S. 683, 704 (1974), and *INS v. Chadha*, *supra*, 462 U.S. at 958. Most importantly, because of the nature of the Commission's work, the sharing will involve bargaining over the appropriate sentences for different crimes, precisely the kind of horse-trading which should be left to the political branches and not the kind of activity in which judges may engage with non-judges, as the Commission did when it decided on the contents of the guidelines here. *See Gubiensio-Ortiz, supra*, at 27 (discussing Commission's refusal to include death penalty as "an entirely understandable response to political pressures by a political body.") Thus, the mixed composition of the Commission further exacerbates the separation of

powers problems already present when Article III judges write binding sentencing rules.⁶

D. Since The Guidelines Are Unconstitutional, Neither Petitioner Nor Any Other Defendant May Be Sentenced Under Them.

In an effort to save the guidelines, the United States, but not the Sentencing Commission, contends that, even if the Commission could not constitutionally issue the guidelines, they should nonetheless be followed under the *de facto* officer doctrine (Br. 58-59 n.48). Initially, we note, as this Court observed in *Norton v. Shelby County*, 118 U.S. 425, 441 (1886), that the doctrine applies only to validate the actions of officers “whatever defects there may be in the legality of their appointment or election,” in order to assure that their authority is obeyed until their status is determined as provided by law. Petitioner here does not argue that any one, or even all of the Commission members, is not properly serving in his or her office, but that the Commission as a whole cannot constitutionally

⁶ The same is true for the power of the President to remove Commission members for cause; it too blurs the accountability of the Commission and renders its independence suspect, because it allows the head of one branch (the President) to affect the workings of the Commission, an independent body within another branch. Indeed, the Solicitor General does not dispute this proposition, but argues that the Commission can be saved since it is an Executive Branch agency whose members the President may properly remove (Br. 43). That proposition, of course, depends upon the correctness of the Solicitor General’s efforts to convince this Court to disregard the express will of Congress and place the Commission in the Judicial Branch. The Commission’s response (Br. 45-49) depends largely on the untenable distinction between actions by judges as courts and those taken by them in their individual capacities.

perform its assigned function. Hence, the *de facto* officer doctrine as such has no applicability here.

The United States also relies on this Court's ruling in *Buckley v. Valeo*, *supra*, 424 U.S. at 142-43, according the past acts of the unconstitutional Federal Election Commission *de facto* validity and allowing Congress thirty additional days to remedy the impediment. The impact of the Department's suggestion is not clear, but if it is to the effect that the guidelines could continue to be applied forever, that is plainly inconsistent with the time limit placed on the Commission in *Buckley*. If it means that petitioner can be sentenced under unconstitutional guidelines, when he has brought the case resulting in the finding of unconstitutionality, that suggestion is truly unprecedented, especially for a criminal case. If the term "administrative actions" in footnote 48 refers to matters other than the issuing of guidelines, petitioner would probably not object to such a ruling, even though this case only concerns the guidelines, plus the severability of parole and good time over which the Commission has no jurisdiction. Furthermore, the individuals challenging the Commission in *Buckley* alleged only that the "agency designated to adjudicate their rights," but which apparently had not yet done so, was unconstitutional, 424 U.S. at 12 n.10, whereas here the injury from the unconstitutional guidelines is clear and direct. Thus, for that reason as well, there is no basis for applying *Buckley* to the thousands of individuals like petitioner who have had criminal sentences imposed on them based on acts of an unconstitutional Commission.

II. THE DEPARTMENT'S ARGUMENTS ON DELEGATION DO NOT RESPOND TO PETITIONER'S BASIC POINT.

Petitioner has not argued that sentencing is a "core function" that can only be exercised by Congress, nor that

Congress made no policy choices in the Sentencing Reform Act.⁷ Rather, petitioner's point is that, despite the large number of directions given to the Commission (most of which are set forth in the Department's brief at 25-28), they are by-and-large not significant because they do not deal with the difficult policy choices that the Commission had to address, except at the perimeter. Instead, the Sentencing Commission was given a task like that of assembling a jigsaw puzzle of a Jackson Pollack painting, without a copy of the original, and with most of the multi-colored pieces interchangeable with one another, other than the edges. It might result in something resembling the original, but that would be more a matter of luck than design.

The Department largely defends the constitutionality of the sentencing guidelines by analogizing them to the parole guidelines which have been upheld against delegation challenges (Br. 29-32). This is rather surprising because, on page 7 of its brief, the Department admits that it was the very inadequacy of the parole guidelines that led to the Sentencing Reform Act. In so doing, it points to the very features of the parole guidelines, beyond their advisory nature, that make any analogy to binding sentencing guidelines wholly inapposite:

Finally, the Parole Commission had only limited powers to adjust the sentences imposed by the courts: it often could not advance the offender's

⁷ Some of the "choices," such as including statements of the purposes of sentencing, contain mutually inconsistent goals, such as eliminating sentencing disparities and retaining the ability to sentence defendants on an individual basis. Even the elimination of the rehabilitation model may be less than complete since the Commission and judges are still required to consider educational factors in sentencing. See 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 994(a).

release date to a date earlier than one-third of the imposed sentence; it could not increase sentences that were unduly lenient; and it had no authority whatever over persons who were not given a custodial sentence or were sentenced to a term of one year or less.

These distinctions, plus those noted in our opening brief (52-53), demonstrate that the constitutionality of the parole guidelines cannot save the sentencing guidelines.⁸

III. THE GOOD TIME PROVISIONS ARE NOT SEVERABLE.

The Department concedes that the elimination of parole is not severable from the sentencing guidelines, but argues that the provisions substantially changing the rules for good time are severable and should be applied. There are two basic reasons, beyond those stated in our opening brief, why the Department's distinction should be rejected.⁹

First, the Department offers no evidence that Congress ever intended the kind of split that it suggests, nor

⁸ The Department also relies on the fact that the task of issuing sentencing guidelines is complex and requires a permanent commission to make adjustments to them in the light of experience (Br. 19). But that argument fails to distinguish between the task of creating the original sentencing guidelines and making adjustments to them in the future. Thus, from a delegation perspective, it is surely far less suspect to allow a Commission to make adjustments that do not alter the basic structure or philosophy of the guidelines than it is to allow it to establish the entire system on its own, as Congress did here. If Congress had established an advisory committee to recommend a sentencing guideline system, and then adopted that system in whole or in part, there would be little likelihood of a successful delegation challenge to future adjustments in it, even if they were made by a commission rather than by Congress.

⁹ Interestingly, the Sentencing Commission, which is the agency directed to administer the Sentencing Reform Act, has taken no position on the severability issue.

did our review of the legislative history find any such evidence. Indeed, the references to good time show that it was part of a package including sentencing guidelines and parole elimination. All that the Department has offered is the assertion that good time is not *necessarily* tied to sentencing guidelines or parole and that there *might* be independent reasons for Congress to have adopted the good time changes on their own. That does not, however, answer the pertinent question of what Congress actually intended to do in 1984. Stated another way, because the Department asked the wrong question, it reached the wrong conclusion.

Second, there is one piece of evidence that strongly supports the position that Congress did not intend changes in good time alone. Congress was very concerned about prison over-crowding and directed the Commission to consider that as a factor in issuing its guidelines. 28 U.S.C. § 994(g). The new good time rules, whatever benefits to inmates they may have in terms of certainty, will work a marked reduction in the total availability of good time credits. Thus, the inevitable effect of the new rules, especially without sentencing guidelines, will be to increase prison populations. Therefore, given Congress' specific concern about over-crowding, and the absence of any affirmative reason to believe that Congress wanted good time changes independent of the other parts of the package, this Court should not sever the good time requirements and should not permit them to go into effect.¹⁰

¹⁰ We note that the Department has apparently abandoned its argument that changes in the Sentencing Reform Act in 1987 have the effect of sustaining its position on good time. That argument was accepted only by Judge Wiggins in his dissent on the severability issue in *Gubiensio-Ortiz*, dissent at 40-41, after he concluded, like the majority, that, based on the 1984 Act alone, there was no basis for severing good time. *Id.* at 39.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the district court should be reversed, and the district court should be directed to resentence petitioner under the pre-1984 law, with the former rules on parole and good time remaining in effect.

Respectfully submitted,

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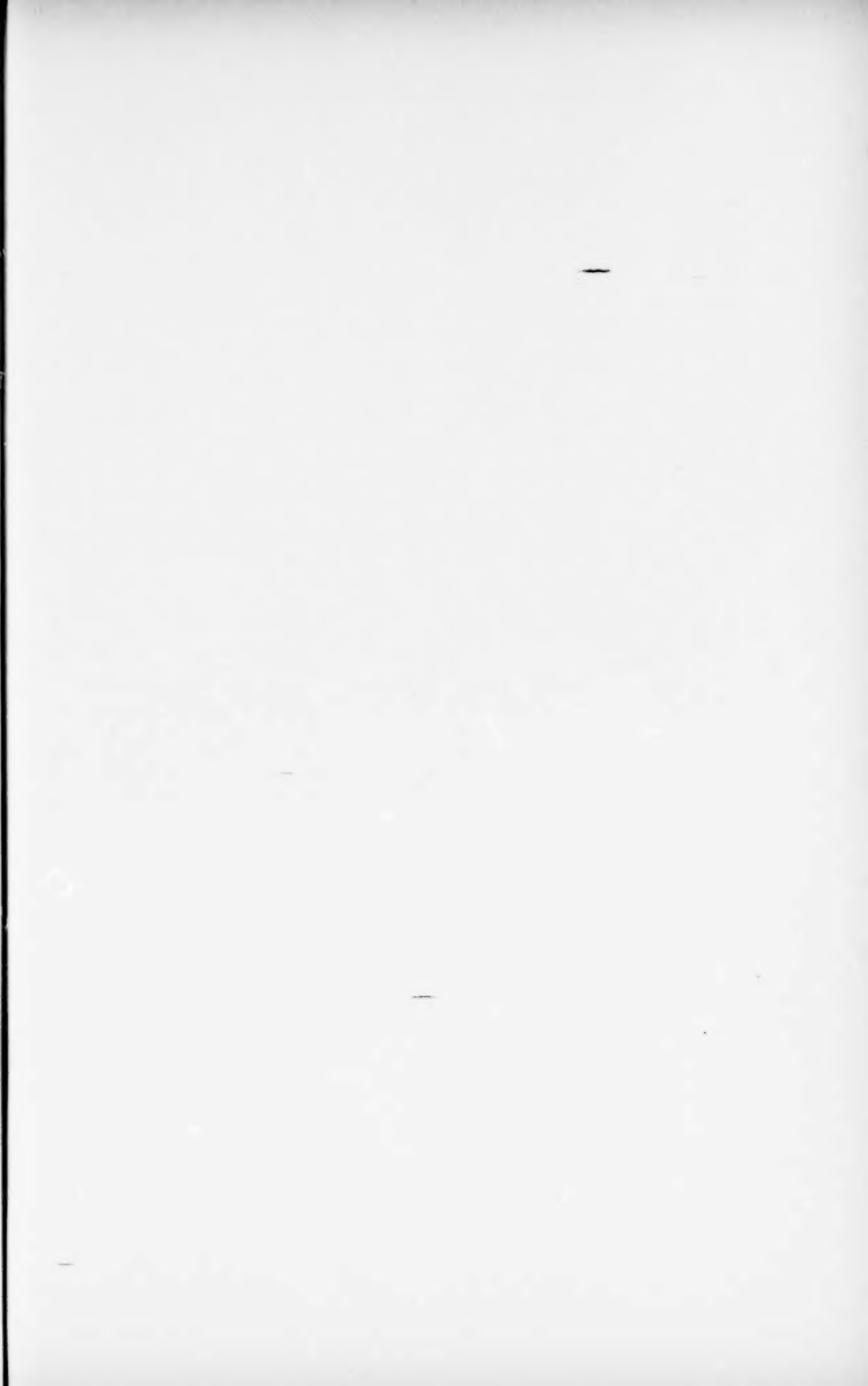
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UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Cross-Petitions for a Writ of Certiorari
Before Judgment to the United States
Court of Appeals for the Eighth Circuit

**BRIEF AS AMICUS CURIAE FOR THE
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QUESTION PRESENTED

Whether the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984 are invalid because the Act unconstitutionally delegates legislative power, violates separation of powers principles, or deprives criminal defendants of due process of law.



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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1904

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

No. 87-7028

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Cross-Petitions for a Writ of Certiorari
Before Judgment to the United States
Court of Appeals for the Eighth Circuit**

**BRIEF AS AMICUS CURIAE FOR THE
UNITED STATES SENTENCING COMMISSION**

INTEREST OF THE AMICUS CURIAE

This case involves a challenge to the constitutionality of the Sentencing Reform Act of 1984, which created the United States Sentencing Commission as “an independ-

ent commission in the judicial branch of the United States" (28 U.S.C. § 991(a)) and authorized the Commission to "establish sentencing policies and practices for the Federal criminal justice system" (28 U.S.C. § 991(b)). Pursuant to that statutory mandate, the Commission has issued detailed guidelines prescribing the appropriate range of sentences for offenders convicted of federal crimes. These guidelines, which were submitted to Congress on April 13, 1987, took effect on November 1, 1987. Pub. L. No. 98-473, § 235, 98 Stat. 2031.

The Commission has a direct and substantial interest in defending the constitutionality of the statute that created it and the validity of the sentencing guidelines that it produced. In fact, in the numerous recent cases in the lower courts challenging the validity of the Act and the guidelines, *only the Commission has defended the constitutionality of the Sentencing Reform Act as enacted by Congress*, because the Department of Justice agreed with the defendants that Congress could not validly assign the function of formulating sentencing guidelines to an agency in the judicial branch. Therefore, the Commission has, with the consent of the Department of Justice, participated fully, by brief and argument, in virtually all of these cases. The Commission's participation is essential in this Court as well, if the Court is to be assured of a complete exposition of the legal issues in this case.¹

DISCUSSION

The United States Sentencing Commission strongly concurs in the Department of Justice's submission that the Court should grant prompt review in this case to resolve the constitutional challenges to the Sentencing Reform Act of 1984. See Appendix, *infra* (Letter from

¹ The Solicitor General and counsel for the defendant have consented to *amicus curiae* participation by the Sentencing Commission in this case.

Chairman Wilkins to Solicitor General Fried, dated March 1, 1988). There is widespread disagreement in the lower courts on the issue of constitutionality, and the questions are of surpassing public importance. It is inevitable, therefore, that this Court will eventually have to resolve these questions. There is nothing to be gained by delaying that resolution: the statute has been attacked on its face, so there is no need to await further factual developments or to monitor experience under the sentencing guidelines; and the legal issues have been fully explored by numerous district courts and are likely to produce several court of appeals decisions prior to the time that this case could be heard.

On the other hand, postponing a final decision on the constitutionality of the Act would have severe adverse effects. Because the Act governs offenses committed after November 1, 1987, the sentencing guidelines ultimately will apply to more than 90% of all criminal cases in the federal courts (see *Federal Sentencing Guidelines Manual* 12 (Feb. 1988))—approximately 40,000 cases each year. Courts handling these cases currently confront a debilitating uncertainty. Defendants similarly situated in every material respect will be sentenced under different regimes and may receive widely disparate sentences, as some judges apply the sentencing guidelines while others follow the pre-guidelines approach. Defendants are being sentenced by some judges under a system that other judges have deemed unconstitutional. Thousands of defendants whose sentences eventually are determined to be illegal will have to be resentenced. The integrity and credibility of the criminal justice system will be severely compromised if the existing chaotic uncertainty and inequality are prolonged.

The cloud on the Sentencing Reform Act also impairs the functioning of the Sentencing Commission. The Sentencing Reform Act empowers the Commission “periodically [to] review and revise” the sentencing guidelines

"in consideration of comments and data coming to its attention" (28 U.S.C. § 994(o)). The Commission is under a continuing obligation to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress on amendments of the guidelines (28 U.S.C. § 994(p)), periodically inform Congress whether the grades or maximum penalties of specified offenses should be modified (28 U.S.C. § 994(r)), monitor and analyze the operation of the guidelines (28 U.S.C. § 994(w)),² issue general policy statements regarding application of the guidelines (28 U.S.C. § 994(a)(2)), and carry out a host of additional responsibilities. See 28 U.S.C. § 995. The performance of these duties is necessarily handicapped when the delegation of authority to and the composition of the Commission are under repeated attack in the lower courts.

The importance of resolving the constitutional doubts about the sentencing guidelines is magnified by the fact that the Department of Justice, while concluding that the guidelines should be upheld, has agreed with the defendants that some portions of the Sentencing Reform Act are unconstitutional. Specifically, the Department has argued in the lower courts that Congress violated principles of separation of powers by creating the Sentencing Commission as an independent commission in the judicial branch. In the Department's view, the power to issue binding rules governing sentencing is exclusively an "executive" function that Congress may not delegate to the judicial branch. The Department's position in the lower courts has been that the Act's constitutional "de-

² This monitoring function has been particularly frustrated because it is dependent upon the Commission's receipt from sentencing courts of a report on each sentence imposed for a non-petty offense. The constitutional challenges to the Act have led many courts either to delay in submitting the statutorily-mandated reports or to decline to submit the reports entirely.

fects" may be remedied simply by "judicially characteriz[ing]" the Commission "as having Executive Branch status" (87-1904 Pet. App. 4a) and by severing the phrase "in the judicial branch" from 28 U.S.C. § 991 (a).³

The Commission's position is, in contrast, that Congress acted entirely within the letter and spirit of the Constitution—as well as with eminent good sense—when it created an independent body in the judicial branch to perform the very special sort of activity involved in the creation of rules, under congressional standards, to order and rationalize the preexisting (virtually unfettered) sentencing discretion of federal judges; when it determined to delegate to a specialized commission, rather than to undertake itself, the massive task of collecting and analyzing data on historic sentencing practices and converting them into detailed guidelines for the future; when it created a diverse Commission that could include a variety of fields of experience but that would also draw on the expertise and disinterested judgment of the federal judiciary; when it decided to give the President a limited power to remove commissioners "only for neglect of duty or malfeasance in office or for other good cause shown" (28 U.S.C. § 991(a)); when it specified that the Commission should be "independent," so that the sensitive functions it performs will be, and will be seen to be, free from undue influence by prosecutorial (or defense) interests; and when it underlined that independence by locating the Commission in the judicial branch, thereby reaffirming that the creation of sentencing guidelines is in aid of a central judicial function.

³ The Department's view was adopted by the district court in this case. See 87-1904 Pet. App. 4a-5a. Most of the other decisions cited in the petition as having upheld the "guidelines sentencing system" have adopted the Sentencing Commission's view that the Sentencing Reform Act is constitutional in its entirety.

Defending the Sentencing Reform Act as Congress wrote it is a matter of significant public moment. As the Department of Justice has observed (87-1904 Pet. 9), the Act "was the product of a decade-long effort to reform the sentencing process in federal criminal cases in order to promote the purposes of punishment while eliminating unjustified disparities in the sentences imposed on convicted defendants." Dissatisfaction with the lack of uniformity in federal sentencing actually dates back at least to 1958, when Congress, adopting a recommendation of the Judicial Conference of the United States, authorized the creation of sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing" "[i]n the interest of uniformity in sentencing procedures." Pub. L. 85-752, 72 Stat. 845 (1958), 28 U.S.C. § 334(a) (1964). The 1958 legislation reflected Congress's concern with "the existence of widespread disparities in the sentences imposed by Federal courts * * * in different parts of the country, between adjoining districts, and even in the same district." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958).

In the early 1970's a prolonged bipartisan effort began to restudy and reform the federal criminal law, including the federal sentencing system. Four different administrations have participated in that effort. The specific bill that became the Sentencing Reform Act was introduced by Senator Edward Kennedy, was cosponsored by leading members from a broad cross-section of each party (see S. Rep. No. 98-225, 98th Cong., 2d Sess. 37 & n.3 (1984)), received the strong endorsement of the Reagan Administration, and was adopted by overwhelming bipartisan majorities of both the Senate and the House of Representatives as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837. Attorney General William French Smith described the Sentencing Reform Act as "a totally new and com-

prehensive sentencing reform that is based on a coherent philosophy" (S. Rep. No. 98-225, *supra*, at 38) and as "the most far-reaching, substantial reform of the criminal justice system ever enacted by Congress," *Introduction*, 32 Fed. B. News & J. 60 (1985), while Senator Kennedy described the Act as "a comprehensive and far-reaching new approach for the federal law of sentencing [designed] to reduce the unacceptable disparity of punishment that plagues the federal system, and * * * to assure sentences that are fair—and perceived to be fair—to offenders, victims, and society." *The Sentencing Reform Act of 1984*, 32 Fed. B. News & J. 62, 65 (1985).

The Sentencing Reform Act thus comes to this Court as the product of an extraordinary, prolonged, bipartisan consensus. It was not the creation of ill-considered political whim or passing partisan passions. The Act reflects a massive inter-branch commitment to the creation of a new system of sentencing that will constitute a major improvement in the administration of justice. —

The Sentencing Commission believes it is essential that constitutional challenges to Congress's landmark legislation be quickly resolved so that the uncertainties surrounding current sentencing practices may be eliminated and the important societal benefits resulting from a consistent and rational system of sentencing guidelines may be achieved. It hopes to participate fully in this litigation so that the substantial arguments in favor of the validity of the Sentencing Reform Act as Congress enacted it may be heard and considered by this Court.

CONCLUSION

The petitions for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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MAY 1988

APPENDIX

THE UNITED STATES SENTENCING COMMISSION

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[SEAL]

March 1, 1988

Honorable Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Fried:

At its meeting today, the Commission unanimously voted to request and support an effort by the Department of Justice to obtain an expeditious decision by the United States Supreme Court on the constitutionality of the Sentencing Reform Act and the sentencing guidelines promulgated by the Commission.

The growing number of constitutional challenges (in excess of fifty filed to date, with conflicting decisions in some half dozen cases) across the country argues strongly for this approach. These same issues will continue to be presented in criminal cases involving post-November 1, 1987, conduct, making it likely that almost every federal district judge will soon be asked to rule on similar challenges. It can be expected that some judges will uphold the guidelines and sentence accordingly; others, including several who have already ruled the guidelines invalid, will sentence based on pre-November 1 law; still others who invalidate the Commission's guideline promulgation authority may impose determinate sentences under the new law without regard to the guidelines.

2a

The impact on all facets of the criminal justice system of this situation constitutes a compelling case for invoking extraordinary procedures to obtain a decision from the United States Supreme Court as early as practicable.

We welcome the opportunity to further discuss this important matter with you and look forward to working with the Department to achieve a prompt and favorable result.

Sincerely,

/s/ Billy Wilkins
WILLIAM W. WILKINS, JR.
Chairman



(11) (4)
Nos. 87-1904 & 87-7028

Supreme Court, U.S.

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CLERK

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ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

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BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The defendant in this case has mounted a broad scale attack on the constitutionality of the sentencing guidelines system established by the Congress as part of the Sentencing Reform Act of 1984. As we explain below, that system—the most ambitious effort ever undertaken by Congress to reconsider the manner in which sentences are imposed on federal criminal defendants—was the product of substantial bipartisan efforts, over a period of more than a decade, within the Congress. The United

States Senate has a strong interest in ensuring that legislation that it has enacted is defended in this Court. See, e.g., *INS v. Chadha*, 462 U.S. 919, 939, 940 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, No. 87-1279.¹

DISCUSSION

For many years, members of Congress have been concerned about the "existence of widespread disparities in the sentences imposed by Federal courts . . . in different parts of the country, between adjoining districts, and even in the same districts." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958). Thirty years ago, Congress attempted to attain uniformity in sentencing by authorizing the creation of sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing." 28 U.S.C. § 334(a). These attempts proved largely unsuccessful, however, because the sentencing institutes and councils were purely advisory. In light of the continuing problem, a decade later the National Commission on Reform of Federal Criminal Laws proposed a comprehensive reform of federal sentencing. See National Commission on Reform of Federal Criminal Laws, *Final Report* 271-317 (1971), reprinted in *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 92d Cong., 1st Sess., Pt. 1, at 129, 424-69 (1971).

Congress held extensive hearings on the National Commission's Final Report. As a result, the Senate included sentencing reform provisions in a bill to revise the crimi-

¹ This appearance as amicus is pursuant to 2 U.S.C. § 288e(a), which provides that the Senate may direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288f(a). See S. Res. 434, 100th Cong., 2d Sess. (1988), 134 Cong. Rec. S6525 (daily ed. May 24, 1988) (directing appearance in this case).

nal code, S. 1437, 95th Cong., 1st Sess. (1977), which the Senate passed on January 30, 1978. 124 Cong. Rec. 1463 (1978). These sentencing reform proposals were carried forward in S. 1722, 96th Cong., 1st Sess. § 125 (1979), and S. 1630, 97th Cong., 1st Sess. § 125 (1981). The proposals were strongly endorsed by the Attorney General's Task Force on Violent Crime (*see* Attorney General's Task Force on Violent Crime, *Final Report* 56-57 (1981)) and were included in S. 2572, 97th Cong., 2d Sess. (1982), which the Senate passed on September 30, 1982. 128 Cong. Rec. 26581 (1982).

Enactment of the Sentencing Reform Act was finally achieved in the Ninety-Eighth Congress. After further hearings,² the Committee on the Judiciary reported to the Senate with strong bipartisan support two bills containing sentencing guideline provisions. S. 668, 98th Cong., 1st Sess. (1983), *reported by* S. Rep. No. 223, 98th Cong., 1st Sess. (1983); S. 1762, 98th Cong., 1st Sess. (1983), *reported by* S. Rep. No. 225, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182. The sentencing reform proposals were debated extensively on the floor,³ and the Senate passed both bills, as it had in earlier Congresses, by overwhelming votes. 130 Cong. Rec. S759, S818-19 (daily ed. Feb. 2, 1984). After the House of Representatives passed similar provisions, 130 Cong. Rec. H10130-31 (daily ed. Sept. 25, 1984), the Sentencing Reform Act of 1984 was enacted into law as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

The Senate Committee on the Judiciary set forth the reasons for this landmark legislation:

² Hearings were held on S. 829, 98th Cong., 1st Sess. (1983), the Administration's criminal code reform package, which included the sentencing reform provisions. *Comprehensive Crime Control Act of 1983: Hearings Before the Subcomm. on Criminal Law of the Sen. Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983).

³ 130 Cong. Rec. S329-33 (daily ed. Jan. 27, 1984); *id.* at S425-33, S457-60 (Jan. 30, 1984); *id.* at S521-36, S541-50 (Jan. 31, 1984); *id.* at S751-59, S814-18 (Feb. 2, 1984).

In the Federal system today, . . . each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.

S. Rep. No. 98-225, *supra*, at 38.

Congress determined that these disparities, whether they occur at sentencing or at the parole stage, "can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing sentence." *Ibid.* The Sentencing Reform Act sought to remedy this defect by abolishing parole, substituting a system of determinate sentences, and providing sentencing courts with explicit direction, in the form of binding guidelines that prescribe the kinds and lengths of sentences appropriate for typical federal offenders. Congress legislated in detail the purposes of the new sentencing guidelines system (18 U.S.C. § 3553(a)(2)), the sentencing decisions covered by the guidelines (28 U.S.C. § 994(a)), the permissible range of the guidelines (28 U.S.C. § 994(b)), the factors that the guidelines must take into account (28 U.S.C. § 994(f)-(j), (l)-(n)), the factors that the guidelines may take into account (28 U.S.C. § 994(c)-(d)), and the factors that the guidelines may not take into account (28 U.S.C. § 994 (e), (k)).

In order to "make criminal sentencing fairer and more certain," S. Rep. No. 98-225, *supra*, at 65, Congress re-

quired sentencing courts to impose sentences "of the kind, and within the range" prescribed by the guidelines, 18 U.S.C. § 3553(b), developed by an independent commission of judges and other sentencing experts within the judicial branch. 28 U.S.C. § 991(a). However, a court may impose a sentence outside the range mandated by an applicable guideline whenever "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (as amended by the Sentencing Act of 1987, Pub. L. No. 100-182, § 3, 101 Stat. 1266). This limited authority for sentencing courts to deviate from the otherwise mandatory guidelines provides "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines," because a factor either is too rare to have been considered by the Commission or was "considered only in its usual form and not in the particularly extreme form present in a particular case." S. Rep. No. 98-225, *supra*, at 78, 79.

Congress determined that its objective of sentencing uniformity would best be achieved by delegating the authority to promulgate sentencing guidelines to an independent commission in the judicial branch, rather than itself undertaking the duty to translate the standards that it legislated into specific sentencing ranges. Congress reasonably concluded that the task of developing guidelines pursuant to the statutory standards should be delegated to a body that could make a permanent commitment of resources, because "the task involves complex issues requiring continuous monitoring and fine tuning." S. Rep. No. 307, 97th Cong., 1st Sess. 976 (1982).

Congress determined that this responsibility for creating and revising sentencing guidelines should remain within the judicial branch, because of its "strong feeling that, even under this legislation, sentencing should

remain primarily a judicial function." S. Rep. No. 98-225, *supra*, at 159. Congress believed that locating the sentencing commission in the judicial branch would best accommodate its view that judges, who "have been among the most articulate spokesmen for sentencing reform," *id.* at 64, should be able to serve on the Commission without sacrificing their lifetime appointments, "since the judge will remain in the judicial branch and will be engaged in activities closely related to traditional judicial activities," *id.* at 163.

At the same time, Congress determined that "all three branches of government, rather than only the judicial branch, [should] participate in the selection of members of the Sentencing Commission." *Id.* at 64. Congress accordingly required that the seven voting members of the Commission—including at least three members chosen from a list of judges submitted by the Judicial Conference—be appointed by the President by and with the advice and consent of the Senate. 28 U.S.C. § 991(a). "This permits legislative branch participation in the selection of members of the body to which Congress will be delegating some of its authority to set sentencing policy." S. Rep. No. 98-225, *supra*, at 64.

Finally, Congress expressed its intent that the Commission function as an independent, balanced, and expert body by requiring the President to make the appointments "after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process," by providing that "[n]ot more than four members of the Commission shall be members of the same political party," and by limiting the President's authority to remove members to grounds of "neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a). As the Senate Committee on the Judiciary explained, the Congress believed that the "extraordinary powers and responsibilities vested in the Commission . . . demand the

highest quality of membership." S. Rep. No. 98-225, *supra*, at 160.

On January 27, 1988, the Attorney General formally notified the President pro tempore of the Senate that, while the executive branch would defend the Act, it would take the position that the Congress may delegate only to the executive branch, but not to the judicial branch, the function of formulating general rules such as sentencing guidelines. The United States has adhered to that position in the lower courts in which the issue has arisen.⁴ In contrast, the Sentencing Commission has striven to articulate to the courts a full defense of the Sentencing Reform Act of 1984. We therefore request the Court not only to act expeditiously to resolve the challenges to the Act, but also to accord to the Sentencing Commission a plenary role in presenting to the Court a complete understanding of Congress's carefully balanced effort to "meet[] the critical challenge of sentencing reform." *Id.* at 65.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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MAY 1988.

⁴ According to the most recent information available to the Sentencing Commission, 119 district judges have ruled upon the constitutionality of the Sentencing Reform Act: 49 have upheld the statute and 70 have invalidated it.

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Supreme Court, U.S.

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AUGUST 1988.

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BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

The Sentencing Reform Act of 1984 resulted from decades of consideration of the intractable problem of disparity and discrimination in sentencing. This brief focuses on that problem, earlier unsuccessful efforts to solve it, and Congress's fashioning of a sentencing guidelines system to foster equality in sentencing, while preserving legitimate individualization. We hope that this discussion will assist the Court in considering the briefs of the United States and the Sentencing Commission, upon which we rely to demonstrate the constitutionality of Congress's determinations.¹

SUMMARY

Since the First Congress judges have had discretion to sentence offenders within broad statutory ranges. The wide disparities that resulted from the virtually unfettered judicial discretion in sentencing have provoked concern for at least a century. In 1958, Congress enacted legislation to increase uniformity through exchanges of views among sentencing judges, but by the early 1970s it was apparent that voluntary measures were inadequate. Research showed that disparity was not isolated or random, but was a pervasive, nationwide problem in part caused by invidious discrimination. Parole, which had once been seen as a remedy for disparate sentencing, came to be seen as itself contributing to inequality.

Building on Judge Marvin Frankel's proposal for a permanent expert agency to formulate rules to guide judicial discretion in sentencing, Senator Kennedy introduced the first sentencing guidelines bill in 1975. In the next two Congresses, the guidelines concept was refined in bills reported by both Houses' judiciary committees and supported by the Executive branch. Finally, in 1984 Congress en-

¹ The Brief of the United States Senate as Amicus Curiae, filed May 1988 in support of certiorari, sets forth the Senate's interest and authority to appear at 1-2 & n.1.

acted and President Reagan signed the Sentencing Reform Act. The Act reflects Congress's determination that channeling and rationalizing judges' discretion through guidelines is the best way to eliminate disparate treatment of similarly situated offenders, while preserving individualized sentencing based on legitimate differences. Congress met these two goals by requiring judges to sentence under the guidelines except in cases where aggravating or mitigating circumstances exist that were not taken into account in the guidelines. It believed that this structure would enhance legitimate individualization by ensuring that sentences reflect the circumstances of each case, rather than the identity and attitude of the sentencing judge.

Congress made three decisions to implement the guidelines system. First, it delegated the task of writing the guidelines to a commission because an independent, professional body created for that purpose could give more thorough and continuous attention to crafting detailed and complex guidelines than could Congress itself. Second, Congress accompanied its delegation with extensive guidance, prescribing the purposes to be met and the tools to be used. It set forth in the Act numerous specific constraints, directives, and prohibitions to guide the commission's discretion. Third, Congress placed the commission in the judicial branch to reflect the judiciary's preeminence in sentencing.

ARGUMENT

I.

THE SENTENCING REFORM ACT DEVELOPED FROM DECADES OF CONCERN OVER DISPARITY IN FEDERAL SENTENCING

A. Efforts to Remedy Sentencing Disparity Have Been Under Way for More Than Fifty Years

The problem of disparity in sentencing has existed throughout the Nation's history. Since the first years under the Constitution, federal criminal statutes have

typically authorized sentencing judges "to consider aggravating and mitigating circumstances surrounding an offense, and, on that basis, to select a sentence within a range defined by the legislature." *United States v. Grayson*, 438 U.S. 41, 46 (1978) (emphasis omitted).² The First Congress, for example, established ranges of punishments for all noncapital offenses.³ The precedent set by the First Congress of legislating sentencing ranges and delegating discretion to judges has predominated throughout the Nation's history.⁴

From the beginning Congress's lack of guidance to channel "the unfettered sentencing discretion of federal district judges," *Dorszynski v. United States*, 418 U.S. 424, 437 (1974), has created a risk of "capricious and arbitrary

² In *Grayson*, the Court stated that "[i]n the early days of the Republic . . . the period of incarceration was generally prescribed with specificity by the legislature." *Id.* at 45. In fact, the shift from legislatively fixed sentences to sentencing ranges had already begun in the colonies. Compare 2 Stat. at L. of Pa. From 1682-1801, ch. 120, at 178 (1896) (1705 law mandating 7 years hard labor and 31 lashes for rape) and 2 *id.*, ch. 117, at 173 (1705 law mandating 6 months hard labor and 21 stripes for burglary during day) with 7 *id.*, ch. 555, at 85 (1900) (1767 law mandating hard labor not exceeding 1 month for vagrancy) and 7 *id.*, ch. 557, at 91 (1767 law mandating hard labor not exceeding 6 months for horsestealing).

³ See, e.g., Act of April 30, 1790, ch. 9, § 2, 1 Stat. 112, 112 (imprisonment not exceeding 7 years and fine not exceeding \$1000 for misprision of treason); *id.*, § 7, 1 Stat. 113 (imprisonment not exceeding 3 years and fine not exceeding \$1000 for manslaughter); *id.*, § 22, 1 Stat. 117 (imprisonment not exceeding 1 year and fine not exceeding \$300 for obstruction of process). For one crime, bribery of a federal judge, Congress left the term of imprisonment and fine to "the discretion of the court." *Id.*, § 21, 1 Stat. 117.

⁴ Congress has mandated fixed terms of imprisonment only rarely. See, e.g., Act of March 3, 1853, ch. 104, § 4, 10 Stat. 226, 239 (imprisonment of 2 years, in addition to fine, for embezzlement by government employee). Congress has sometimes narrowed judicial discretion by fixing minimum, as well as maximum, sentences. See, e.g., Act of April 20, 1818, ch. 91, § 6, 3 Stat. 450, 452 (imprisonment of 3 to 7 years and fine of \$1,000 to \$10,000 for importing of slaves); Narcotic Control Act of 1956, Pub. L. No. 728, ch. 629, §§ 103, 105-108, 201, 70 Stat. 567, 568-71, 573-75 (various minimum sentences).

sentences." *Grayson*, 438 U.S. at 48. Briefly in the last century, egregious disparities could be ameliorated by appellate reduction of unduly harsh sentences.⁵ However, since the abolition of appellate review of sentencing in 1891,⁶ the "rule" has become "firmly established . . . that the appellate court has no control over a sentence which is within the limits allowed by a statute."⁷ Meanwhile, "every other leading system of the free world, including the English, abandoned the position of non-reviewability of sentences. . . ." ⁸ Early in this century, "the United States [became] the only nation in the free world where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination."⁹

⁵ See, e.g., *Bates v. United States*, 10 F. 92, 96 (C.C.N.D. Ill. 1881); *United States v. Wynn*, 11 F. 57, 57-58 (C.C.E.D. Mo. 1882). Appellate review was authorized by the Act of Mar. 3, 1879, ch. 176, § 3, 20 Stat. 534. Before 1879 Congress had not authorized appellate sentencing review. See *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833).

⁶ The statute that established the current courts of appeal, Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, repealed appellate jurisdiction over sentencing by implication. *Freeman v. United States*, 243 F. 353, 357 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919); see *United States v. Rosenberg*, 195 F.2d 583, 604 n.25 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

⁷ *Dorszynski*, 418 U.S. at 440-41 (quoting *Gurera v. United States*, 40 F.2d 338, 340-41 (8th Cir. 1930)). Appellate courts have overturned sentences within the prescribed statutory range only in exceptional cases in which the sentencing judge relied upon impermissible factors, e.g., *United States v. Tucker*, 404 U.S. 443, 447-48 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *United States v. Maples*, 501 F.2d 985, 987 (4th Cir. 1974), or failed to exercise discretion, e.g., *Yates v. United States*, 356 U.S. 363, 366 (1958); *United States v. Barker*, 771 F.2d 1362, 1365-69 (9th Cir. 1985).

⁸ George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250, 253 (1959); see 7 Edw. VII, c. 23, § 4(3) (1907) (England).

⁹ *Dorszynski*, 418 U.S. at 440 n.14 (quoting Symposium, Appellate Review of Sentences, 32 F.R.D. 257, 260-61 (1962)); *Gore v. United States*, 357 U.S. 386, 393 (1958).

The resulting "gross and startling inequalities" in sentencing in the United States have provoked concern for at least a century. *Long v. Short Sentences*, 20 Wash. L. Rep. 135 (1892); Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17, 18 (1900). Homer Cummings was the first of many Attorneys General to bring the problem of sentencing disparity to Congress's attention. Attorney General Cummings reported his studied "conclusion that there frequently occur wide disparities and great inequalities in sentences imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of facts." The Attorney General told Congress that the extent to which criminal penalties "depend upon chance and on the fortuitous circumstance that a particular judge disposes of the case . . . makes it difficult to maintain that equal, even-handed justice is attained."¹⁰

As the number of criminal offenders grew and the courts increased their vigilance about the procedures used to adjudicate criminal guilt, concern rose about the unfettered judicial discretion in sentencing. Describing "the disparity of sentences" as "a seriously urgent problem," then-Circuit Judge Potter Stewart noted the "anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice." *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958). Professor Henry Hart identified the costs of the "anarchical inequality" in sentencing:

The very ideal of justice is offended by seriously unequal penalties for substantially similar crimes, and the most immediate of its practical purposes

¹⁰ U.S. Dep't of Justice, *Annual Report of the Attorney General of the United States* 6, 7 (1938); accord *id.* at 6 (1939) (Att'y Gen. Murphy); *id.* at 5-7 (1940) (Att'y Gen. Jackson); *id.* at 4 (1941) (Att'y Gen. Biddle).

are obstructed. Grievous inequalities in sentences are ruinous to prison discipline. And they destroy the prisoner's sense of having been justly dealt with, which is the first prerequisite of his personal reformation.

Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 439 (1958). Professor Hart concluded that "achievement of the purposes of the criminal law can never be satisfactorily approximated until this intractable problem is in some fashion reduced to minor, instead of major, proportions." *Id.*

Congress's "pain[st]aking evaluation" in 1958 confirmed "that prisoners with similar backgrounds and similar offenses are serving markedly disparate sentences," thereby "weaken[ing] respect for the administration of justice." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 4, 6 (1958). "In the interest of uniformity in sentencing procedures," Congress authorized the Judicial Conference to convene "institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing."¹¹ These sentencing institutes and councils were intended to encourage "Federal judges [to] reach a desirable degree of consensus as to the types of sentences which should be imposed in different kinds of cases." S. Rep. No. 2013, 85th Cong., 2d Sess. 3 (1958).

Congress also expanded the use of parole toward the same end. Parole had been instituted in the federal system in 1910,¹² patterned after state experiments replacing "the old rigidly fixed punishments" with "[i]ndeterminate sentences." *Williams v. New York*, 337 U.S. 241, 248 (1949). The traditional retributive model of sentencing was tempered with an "emerging rehabilitation model," in which "judges and correctional personnel, particularly the latter, . . . set the release date

¹¹ Act of Aug. 25, 1958, Pub. L. No. 85-752, § 1, 72 Stat. 845, 845 (28 U.S.C. § 334(a)).

¹² Act of June 25, 1910, ch. 387, 36 Stat. 819.

of . . . prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism." *Grayson*, 438 U.S. at 46. Parole was seen as an instrument to correct sentencing disparities by permitting offenders to be released upon rehabilitation, rather than after an arbitrary period fixed by the sentencing judge. The 1958 law expanded the use of indeterminate sentences in the belief that "additional flexibility in the determination of parole eligibility . . . will mitigate the problem of sentence disparities."¹³

The 1958 statute proved to be of limited success. Assembling judges to exchange views failed to generate sufficient consensus to "produce meaningful criteria for sentencing."¹⁴ By 1962 Circuit Judge Simon Sobeloff had concluded that institutes "should not be expected to afford by themselves a complete solution for this deep-seated problem. Institutes will have but slight impact on extreme disparities. . . ." ¹⁵ District Judge Marvin Frankel argued that "the sentencing institute is almost entirely irrelevant" to the root cause of disparity: the absence of any law to guide judges' discretion. M. Frankel, *Criminal Sentences: Law Without Order* 66 (1972). Judge Frankel viewed "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences" as "terrifying and intolerable for a society that professes devotion to the rule of law." *Id.* at 5. He maintained that elemental standards of justice compelled our "reject[ing] individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyn-

¹³ *Federal Sentencing Procedure: Hearing Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 38 (1958).

¹⁴ *Proceedings of the Pilot Institute on Sentencing*, 26 F.R.D. 231, 239 (1959).

¹⁵ Symposium, *Appellate Review of Sentences*, 32 F.R.D. 257, 270 (1962). Sentencing councils eliminate only 10 percent of unwarranted disparity. Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U.Chi.L.Rev. 109, 137 (1975).

cratic ukases of particular officials, judges or others." *Id.* at 11.

Rather than relying on appellate review to develop a common law of sentencing, which he saw as insufficient, *id.* at 84, Judge Frankel proposed a permanent agency composed of judges and other experts "responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) the actual enactment of rules, subject to traditional checks by Congress and the courts." *Id.* at 119 (emphasis omitted). Judge Frankel envisioned the commission's "creation eventually of a detailed chart or calculus to be used . . . by the sentencing judge in weighing the many elements that go into the sentence" and "by appellate courts in reviewing what the judge has done." *Id.* at 113. While "legislators do not (and should not) lightly delegate their authority," Judge Frankel argued that the "need [for] ongoing study and an indefinite course of revision" provided "good reason for delegating in this instance." *Id.* at 122. He likened his proposal to delegating rulemaking authority to administrative agencies in areas that Congress had similarly determined "neither require nor are likely to receive from the legislature the necessary measure of steady attention." *Id.*¹⁶

Judge Frankel's plea for reform received a powerful boost with the publication in the early 1970s of a spate of empirical studies of sentencing. One analysis revealed "widespread sentencing disparity" across federal districts in the decision whether to incarcerate or to grant proba-

¹⁶ Judge Frankel's proposal mirrored a suggestion in England eighty years earlier to reduce sentencing disparity by creating "a Commission composed of competent persons (not all lawyers) having knowledge and aptitude . . . [to] fram[e] . . . a code" of "leading principles to be observed in awarding punishment . . . for the guidance of Courts." Hawkins, *Crime and Punishment*, 8 New Rev. 617, 619-20 (1893); Crackanthorpe, *New Ways With Old Offenders*, 34 Nineteenth Century 614, 630-31 (1893).

tion and in the average length of incarceration.¹⁷ The average sentence for robbery, for example, was 39 months in the Northern District of New York, but 224 months in the Northern District of Texas and 240 months in the Northern District of West Virginia.¹⁸

The possibility that such statistics were obscuring real differences in cases that justified differential treatment was dispelled by an experiment undertaken by the Second Circuit in 1974.¹⁹ Fifty district judges imposed shadow sentences based on identical portfolios of twenty hypothetical defendants. "The variations in the judges' proposed sentences in each case were astounding." S. Rep. No. 98-225, at 41. "In one extortion case, for example, the range of sentences varied from twenty years imprisonment and a \$65,000 fine to three years imprisonment and no fine."²⁰ Another study concluded that less than one-half of the variance in sentences could be explained by legitimate factors and that differences in judges' attitudes accounted equally for the disparities. See *id.* at 44.

Moreover, the prevailing disparities were not purely arbitrary, but invidious. Research suggested that the disparity was attributable in part to discrimination on the basis of race and other illegitimate factors.²¹ As Professor Alan Dershowitz testified, "The statistics are appalling. . . . [W]hen both the crime and the previous history of the offender are held equal, black and minority offenders fare

¹⁷ See P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* 3, 5-6 (1977).

¹⁸ *Id.* at 4-5. These disparities were corroborated by numerous studies. See S. Rep. No. 225, 98th Cong., 1st Sess. 41 & nn.18-21, 44 & nn.23-25 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 3183.

¹⁹ A. Partridge & W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (1974).

²⁰ *Id.* at 44 (citing A. Partridge, *supra* note 19, at 5); see *id.* at 42-43.

²¹ See *Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess., Pt. 2, at 1118, 1179 (1984); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1630-32 (1988).

considerably worse.”²² The intractability of the problem of invidious discrimination in sentencing provided strong impetus to adoption of a system to guide judges’ discretion.²³

Heightened concern over sentencing disparity and discrimination coincided with a growing recognition of the elusiveness of the goal of rehabilitation. Observers pointed out that loss of confidence in the ability to rehabilitate or to identify rehabilitation had undermined the analytical basis for indeterminate sentencing and parole. See S. Rep. No. 98-225, at 38. Absent rehabilitation, Judge Frankel remarked, “[t]he [indeterminate] sentence purportedly tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing.” M. Frankel, *supra* p. 7, at 93. Far from remedying disparity, the administration of parole came to be seen as contributing to inequity and discrimination.²⁴ The Commission that investigated the prison disturbance at Attica in 1971 concluded that “the parole system was a primary source of tension and bitterness within the walls. Parole . . . was . . . intended as a beneficial reform to promote rehabilitation. Instead, it became an operating evil.”²⁵

In 1973 the federal parole board attempted to achieve “more nearly uniform decisions” by adopting Parole Release Guidelines “more rigid[ly] [to] structur[e] . . . the Board’s discretion.” *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1111 (D.C. Cir. 1974). The guidelines generated “a ‘customary range’ of confinement for various classes of offenders” through use of “a matrix, which combines a ‘parole prognosis’ score (based on the prisoner’s . . . personal factors) and an ‘offense severity’ rating, to yield the

²² *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., Pt. 13, at 9047 (1977) [hereinafter *Senate Hearing*].

²³ See *Developments in the Law*, *supra* note 21, at 1634, 1638-39.

²⁴ See *id.* at 94-97; K. Davis, *Discretionary Justice* 128-29 (1969).

²⁵ N.Y. State Special Comm’n on Attica, *Attica: The Official Report* 93 (1982).

'customary' time to be served in prison." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 391 (1980). Congress "provided the first legislative authorization for parole release guidelines," *id.*, in 1976 by enacting the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, which delegated the task of promulgating guidelines to "reduc[e] the opportunity for sentencing disparity," S. Rep. No. 369, 94th Cong., 1st Sess. 18 (1975), to the Parole Commission, "an independent agency in the Department of Justice," 90 Stat. 219.

Although the parole guidelines achieved "a measure of success in reducing sentencing disparities,"²⁶ serious shortcomings in the division of responsibility between sentencing judges and the Parole Commission soon emerged. First, "disparities still remained because the initial decisions by judges whether to incarcerate an offender at all [or to grant probation] could not be controlled by the guidelines." *Id.* Second, "the guidelines . . . attempt[ed] to impose sentencing uniformity after the fact. Judges ha[d] no obligation to use the guidelines . . . in the initial sentencing decision." *Id.* The resulting anomaly was that judges and the Parole Commission often worked at cross-purposes: the Commission tried to equalize judges' disparate sentences, while the judges crafted sentences to achieve results they preferred despite the guidelines.²⁷ Further, the Parole Commission virtually abandoned any effort to factor rehabilitation into parole decisions,²⁸ despite the fact that rehabilitation had once been the sole criterion for parole. Thus, even more paradoxically, by the mid-1970s, the Parole Commission was making presumptive release decisions soon after sen-

²⁶ P. O'Donnell, *supra* note 17, at 25.

²⁷ See Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810, 883-86 (1975).

²⁸ See *Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1207 (3d Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Moore v. Nelson*, 611 F.2d 434, 438 (2d Cir. 1979).

tencing, based entirely on the factors used at sentencing.²⁹

B. A Decade of Legislative Deliberation Led to Enactment of the Sentencing Reform Act

The legislative effort for sentencing reform grew directly out of the academic and professional criticisms leveled at the sentencing system. The idea of a commission to promulgate sentencing guidelines first appeared in legislative form in 1975, when Senator Kennedy introduced a bill, S. 2699, 94th Cong., 1st Sess. (1975), building on Judge Frankel's and Pierce O'Donnell's work, to authorize the Judicial Conference to appoint a commission to promulgate guidelines for consideration by courts as "the beginning of a concerted legislative effort to deal with sentencing disparity." 121 Cong. Rec. 37562 (1975). In the next Congress, Senators McClellan and Kennedy refined the sentencing commission concept in a criminal code reform bill³⁰ fashioned with the support of Attorney General Griffin Bell.³¹ Their bill set forth statutory purposes of punishment for the first time ever, *id.*, § 101, and mandated creation of a commission in the judicial branch to promulgate guideline sentencing ranges to meet the

²⁹ See 90 Stat. 224 (18 U.S.C. § 4208(a)); 28 C.F.R. §§ 2.12, 2.20 (1977); Project, *supra* note 27, at 892.

³⁰ The criminal code reform effort was spawned by the work of the National Commission on Reform of Federal Criminal Laws, which was charged to study the criminal justice system and recommend revision of the federal criminal laws, including "changes in the penalty structure." Act of Nov. 8, 1966, Pub. L. No. 89-801, § 3, 80 Stat. 1516, 1517. The Commission proposed recodifying the criminal code, regrading offenses to rationalize the sentencing structure, and instituting appellate review of sentencing. Nat'l Comm'n on Reform of Federal Criminal Laws, *Final Report* 271-317 (1971). The Commission's proposal was introduced in the Senate, S. 1, 93d Cong., 1st Sess. (1973); S. 1, 94th Cong., 1st Sess. (1975), and stimulated a decade of deliberation, before omnibus reform was abandoned in favor of a less comprehensive approach in 1982.

³¹ S. 1437, 95th Cong., 1st Sess. (1977), reprinted in *Senate Hearing*, *supra* note 22, Pt. 13, at 9485-9792.

statutory "purposes of sentencing, avoiding unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." *Id.*, § 241.

At the opening of hearings, Senator Kennedy stressed the importance "of a sentencing commission, which, hopefully, will report back to the Congress with guidelines for various Federal crimes. In addition, the bill requires written reasons be stated by the court at the time of sentence and provides for appellate review in cases where the sentence is above or below the prescribed guidelines. The bill thus deals with the critical problem of sentencing disparity." *Senate Hearing, supra* note 22, Pt. 13, at 8578-79. After a broad range of favorable testimony, *id.* at 8870-9057, the Senate Committee on the Judiciary reported the bill to the Senate, S. Rep. No. 605, 95th Cong., 1st Sess. (1977), which passed it, 124 Cong. Rec. 1463 (1978). Similar legislation was reported out of both Houses' judiciary committees in the next two Congresses,³² but stalemate over comprehensive criminal code reform prevented enactment of a sentencing guidelines measure.

In the Ninety-Eighth Congress, a broad bipartisan consensus in favor of sentencing guidelines emerged. Guidelines provisions were contained in bills introduced by Senator Kennedy, S. 668, *reprinted in* 129 Cong. Rec. 3798, 3806 (1983), by Senators Thurmond and Laxalt on behalf of the Administration, S. 829, tit. II, *reprinted in* 129 Cong. Rec. S3077, S3080 (Mar. 16, 1983), and by Senator Dole on behalf of the Judicial Conference, S. 1182, *reprinted in* 129 Cong. Rec. S5659 (Apr. 28, 1983).

The Senate Judiciary Committee reported two bills containing identical guidelines provisions. S. 668, *reported by*

³² S. 1722, tit. III, *reported by* S. Rep. No. 553, 96th Cong., 2d Sess. (1980); H.R. 6915, *reported by* H.R. Rep. No. 1396, 96th Cong., 2d Sess. (1980). Neither House acted on the bills. In the 97th Congress, the Senate Judiciary Committee again reported guidelines legislation. S. 1630, § 126, *reported by* S. Rep. No. 307, 97th Cong., 2d Sess. (1982). Similar provisions passed the Senate by a vote of 95 to 1, 128 Cong. Rec. 26581 (1982), but were not approved by the House.

S. Rep. No. 223, 98th Cong., 1st Sess. (1983); S. 1762, tit. II, *reported by* S. Rep. No. 98-225. After extended debate ³³ the Senate passed both bills by votes of 91 to 1, 130 Cong. Rec. S759 (Feb. 2, 1984), and 85 to 3, *id.* at S818-19. The House passed identical sentencing provisions as an amendment to H.R.J. Res. 648, the fiscal year 1985 continuing appropriations resolution. *Id.* at H10130-31 (Sept. 25, 1984). The Senate amended the sentencing title of H.R.J. Res. 648, *id.* at S13384, S13520 (Oct. 4, 1984), the House agreed to the Senate amendments after a conference, H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415 (1984), and President Reagan signed the Sentencing Reform Act of 1984 into law. Pub. L. No. 98-473, § 211-239, 98 Stat. 1837, 1987.

II.

CONGRESS ADOPTED A GUIDELINES SYSTEM TO ELIMINATE UNWARRANTED DISPARITY BUT PERMIT JUSTIFIED INDIVIDUALIZATION IN SENTENCING

Thus, after more than a decade of deliberation over the continuing problem of sentencing disparity, Congress adopted a sentencing guidelines system in the Sentencing Reform Act of 1984. Congress determined that channeling and rationalizing judges' discretion through guidelines was the best way to achieve the two attributes of fair sentencing: filtering out disparities in the treatment of similarly situated cases while preserving individualized sentencing determinations based on legitimate differences between cases.

Congress concluded that formally structuring judicial discretion through guidelines would help, where voluntary exchanges of views among judges had failed, "to achieve the goal of avoiding disparity in sentences that

³³ 129 Cong. Rec. S11679-S11712 (Aug. 4, 1983), S17077-80 (Nov. 18, 1983); 130 Cong. Rec. S329-33 (Jan. 27, 1984), S395-96, S425-33, S457-60 (Jan. 30, 1984), S521-36, S541-50 (Jan. 31, 1984), S751-59, S814-18 (Feb. 2, 1984).

are not justified by differences among offenses or offenders." S. Rep. No. 96-553, at 944. At the same time, Congress recognized that

each offender stands before a court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.

S. Rep. No. 98-225, at 150.

Congress sought to meet the twin goals of equal and individualized treatment by requiring judges to sentence under the guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a [different] sentence." 18 U.S.C. § 3553(b) (Supp. IV 1986).³⁴ The Senate Judiciary Committee explained that, "[i]f the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range," because,

³⁴ An earlier bill reported by the Senate Judiciary Committee had not included a specific standard to guide judges' decisions to follow or to depart from the guidelines, but had directed judges to "consider" the applicable guidelines along with other enumerated factors, including the need to avoid unwarranted disparities. S. 1437, 95th Cong., 1st Sess. § 101 (1977) (18 U.S.C. § 2003). Senator Gary Hart offered the more specific standard for departure as a floor amendment. 124 Cong. Rec. 382 (1978). Senator Kennedy agreed that the amendment furthered the Committee's intent to "make sure these guidelines are followed in the great majority of cases," and it was agreed to, *id.* at 383, and carried forward in subsequent bills.

The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it would have promulgated a different range. The offender before him should not receive more favorable or less favorable treatment solely by virtue of the sheer chance that he is to be sentenced by a particular judge.

S. Rep. No. 95-605, Pt. 1, at 893.

"At the same time," Congress provided "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines." S. Rep. No. 96-553, at 944. Congress "expected that most sentences will fall within the ranges recommended in the sentencing guidelines," but where "there is an offense or offender characteristic, not adequately considered by the Sentencing Commission, that justifies a sentence different from that provided . . . the judge [should be authorized to] deviate from the guideline's recommendation." S. Rep. No. 98-225, at 150. "A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in a particularly extreme form which happens to be present in a particular case." S. Rep. No. 96-553, at 944. Congress recognized that the guidelines could not "be imposed in a mechanistic fashion," because "the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." S. Rep. No. 98-225, at 52.

In striking this balance between curbing unwarranted disparity and permitting individualized consideration of legitimate distinguishing factors, Congress rejected a proposal "which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines" to "whenever a judge determined that the characteristics of the offender or the circum-

stances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines." *Id.* at 79. Senator Thurmond explained that the ill of disparity demanded guidelines "that have teeth in them" and are not "merely advisory information for the judiciary to accept or reject based on each individual judge's view of the appropriateness of the guideline sentence." 130 Cong. Rec. S428 (Jan. 30, 1984).

Congress put additional "teeth" in the guidelines by authorizing appellate review of sentences that departed "unreasonabl[y]" from the guidelines, 18 U.S.C. § 3742(d)(3), "to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines," S. Rep. No. 96-553, at 1136.³⁵ This limited appellate review "preserve[s] the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, [it is] intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing." S. Rep. No. 96-553, at 1136.

Congress slightly modified the departure standard in 1987 by altering the condition for sentencing outside the guidelines—if an aggravating or mitigating circumstance had not adequately been taken into account by the Commission—to permit departure if "the court finds that

³⁵ The sentencing judge "shall state in open court . . . the specific reason for the imposition of a sentence" outside the guidelines. 18 U.S.C. § 3553(c). In determining whether a sentence departed unreasonably from the guidelines, the appellate court must consider "the [statutory] factors to be considered in imposing a sentence . . . and . . . the reasons for the imposition of the particular sentence, as stated by the district court" and "shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous." *Id.* § 3742(d)(3).

there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”³⁶ “The addition of kind or degree [was] intended to make explicit what was intended when the Sentencing Reform Act was passed and [was] not intended to enlarge the court’s authority to depart from the guidelines.”³⁷ The change responded to the “concern . . . that without this phrase some courts might erroneously interpret the Sentencing Reform Act as limiting their ability to consider seriously aggravating or mitigating circumstances if those circumstances were mentioned at all by the guidelines, even if the case before the court was clearly different from what the Sentencing Commission had in mind in writing the guidelines.” 133 Cong. Rec. H10021 (Nov. 16, 1987).

Through the departure and appellate review provisions, Congress carefully designed the guidelines system to achieve its goal of “provid[ing] a structure for evaluating the fairness and appropriateness of the sentence for an individual offender,” without “eliminat[ing] the thoughtful imposition of individualized sentences.” S. Rep. No. 98-225, at 52. Congress intended the guidelines to “enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.” *Id.* at 161. As this Court has recognized, sentencing guidelines “further an essential need of the Anglo-American criminal-justice system—to balance the desirability of a high degree of uniformity against the

³⁶ 18 U.S.C.A. § 3553(b) (West Supp. 1988), as amended by Sentencing Act of 1987, Pub. L. No. 100-182, § 3(1)-(2), 101 Stat. 1266 (emphasis added to show change).

³⁷ 133 Cong. Rec. H10017 (Nov. 16, 1987) (Rep. Conyers); accord *id.* at S16648 (Nov. 20, 1987) (Sen. Kennedy); 23 Week. Comp. Pres. Doc. 1453 (Dec. 14, 1987).

necessity for the exercise of discretion." *McCleskey v. Kemp*, 107 S.Ct. 1756, 1777 n.35 (1987).

III.

CONGRESS'S ESTABLISHMENT OF A COMMISSION TO PROMULGATE SENTENCING GUIDELINES RESPECTS THE PROPER ROLES OF THE BRANCHES

Congress made three determinations to implement its decision to adopt guidelines sentencing. First, it delegated the task of promulgating guidelines to a commission. Second, it accompanied its delegation with detailed guidance. Third, it placed the commission in the judicial branch. Each of these decisions was based on sound considerations that respected the roles of the legislative and judicial branches.

A. Congress Sensibly Delegated the Task of Promulgating Guidelines to a Commission

After its decade-long effort at criminal code reform, *see supra* note 30, Congress established the Sentencing Commission based upon its considered view that rational and equitable sentencing could best be achieved by assigning the task of developing sentencing guidelines to a permanent independent agency. Experts testified that developing guidelines would require "time consuming . . . analysis of existing sentencing practice, and extensive simulations with alternative guideline models."³⁸ One commentator observed that, because of "the complexities and intricacies that are involved in establishing a scale of proportionate penalties for hundreds of different crimes," without delegation to an expert body, "[e]ither the scale will become ludicrous or the differences in crimes and culpability will become meaningless." R. Singer, *Just Deserts* 58 (1979).

³⁸ *Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess., Pt. 1, at 593 (1979) [hereinafter *1979 House Hearings*] (Prof. Andrew von Hirsch).

Further, because guidelines require "continued experimentation and revision over time—as experience reveals the difficulties, ambiguities and omissions of the original rules," Congress concluded that the guidelines should be written by an entity "capable of reviewing and adjusting the guidelines continually, in the light of accumulating experience."³⁹ Witnesses also pointed out that, because sentencing is not an area, like taxation, in which participation by all interests in the political process will produce a balanced outcome, delegation to an independent, professional body could produce fairer guidelines.⁴⁰ Based upon those considerations and states' recent experiences, Congress sensibly concluded that more refined guidelines to effect its purposes could be produced by a commission, rather than by Congress itself.

B. Congress Accompanied the Delegation to the Commission With Detailed Legislative Guidance

Contrary to the defendant's claim, Congress provided extensive instructions to guide the Sentencing Commission's delegated duty to "establish sentencing policies and practices." 28 U.S.C. § 991(b)(1). Most fundamentally, Congress charged the Commission with three goals: (1) to "assure the meeting of the purposes of sentencing as set forth" in the law;⁴¹ (2) to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar

³⁹ 1979 House Hearings, *supra* note 38, at 593 (Prof. von Hirsch).

⁴⁰ See *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess., Pt. 2, at 1344 (1977-78) (Prof. von Hirsch); R. Singer, supra p. 19, at 58-59.*

⁴¹ The Act established four purposes of sentencing: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;" and (3) to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A)-(C).

Congress prescribed the specific tool—the guidelines system—for the Commission to use to regulate sentencing. Congress directed the Commission to develop a system of "sentencing range[s]" applicable "for each category of offense involving each category of defendant." *Id.* § 994(b). Congress expected "that there will be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including, for example, "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98-225, at 168. Congress intended that there "be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*⁴²

Congress supplied two overarching constraints to the guidelines. First, the sentencing ranges must be "consistent with all pertinent provisions of title 18, United States Code," including all maximum sentences fixed by law. 28 U.S.C. § 994(b).⁴³ Second, for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if

⁴² Congress gave the Commission flexibility to design the guidelines "in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices. . . . [T]he result will be sets of guidelines considerably more detailed than the existing parole guidelines." *Id.*

⁴³ The Commission may only recommend changes in maximum penalties. *Id.* § 994(r).

the minimum term of the range is 30 years or more, the maximum may be life imprisonment." *Id.* § 994(b)(2). Through the interaction of this requirement and the directive that "all the ranges together . . . cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it," S. Rep. No. 98-225, at 168, Congress effectively set the degree of graduation of the entire guidelines system.

Congress provided additional direction to govern the severity or leniency of sentencing and the use of incarceration. Congress mandated "that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants . . . eighteen years old or older" on a third felony conviction for a crime of violence or drug trafficking. 28 U.S.C. § 994(h). Congress directed "that the guidelines specify a sentence to a substantial term of imprisonment" for defendants in five other specified categories of particularly serious criminal behavior. *Id.* § 994(i).⁴⁴ Descending the scale of criminal conduct, Congress stipulated that the guidelines reflect "the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury" and "of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* § 994(j). Thus, Congress in effect legislated the entire hierarchy of punishment by creating four categories of sentences—imprisonment at or near the statutory maximum, substantial imprisonment, some imprisonment, and no imprisonment—and by stipulating

⁴⁴ Congress mandated substantial incarceration for offenses constituting a third felony conviction, reflecting career criminal status, furthering a managerial role in a racketeering conspiracy, constituting a felony crime of violence while on release from another felony conviction, and involving trafficking in substantial quantities of drugs. *Id.*

the most important offense and offender characteristics to match defendants with the four categories.⁴⁵

Beyond legislating the overall hierarchy of punishment, Congress provided abundant guidance about the specific factors to be used to construct the sentencing ranges that make up the guidelines matrix. Congress prescribed specific criteria to regulate the imposition of enhanced penalties for multiple offenses, 28 U.S.C. § 994(l), and required diminished punishment "to take into account a defendant's substantial assistance in the investigation or prosecution of another" offender, *id.* § 994(n). Equally significantly, Congress set forth factors that could not be used in the guidelines. Of critical importance to Congress's goal of eradicating discrimination, Congress ordered that the guidelines be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d). Congress buttressed its command of equality by foreclosing the more subtle practice of ordering "imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment," *id.* § 994(k), and by requiring the guidelines to "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in decisions about imprisonment, *id.* § 994(e).⁴⁶

⁴⁵ It is thus simply untrue, as the defendant asserts, "that all of the rankings could have been raised or lowered dramatically, as the Commission and the Commission alone thought appropriate, and there would have been no basis to object because Congress left all of those choices up to seven politically unaccountable individuals." Brief of Respondent-Petitioner John M. Mistretta 50 [hereinafter *Mistretta Br.*].

⁴⁶ Congress did permit the guidelines to take these factors into account to the extent "relevan[t] to the nature, extent, place of service, or other incidents of an appropriate sentence." *Id.* § 994(d) (2)-(3), (6)-(8). The Senate Judiciary Committee explained that factors such as education or family or community ties, although "generally inappro-

Moreover, even where Congress delegated discretion, it detailed numerous factors for the Commission to consider. In the "establish[ment of] categories of offenses for use in the guidelines," Congress specified seven factors for the Commission to take into account where relevant: the grade of the offense; mitigating or aggravating circumstances of its commission; the nature and degree of the "harm caused," including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; the community view of the offense's gravity; the public concern generated; general deterrence of commission of the offense; and the offense's incidence in the community and nation. 28 U.S.C. § 994(c). Similarly, in the establishment of categories of offenders, Congress spelled out specific factors for the Commission to consider, including the offender's age; mental and emotional condition; physical condition, including drug dependence; role in the offense; criminal history; and degree of dependence on criminal activity for a livelihood. *Id.* § 994(d)(1), (4)–(5), (9)–(11).⁴⁷

The procedural contexts in which Congress required the Commission to function are a final source of legislative guidance. First, Congress ensured that guidelines would be developed in a historical context by instructing the Commission to ascertain the average prevailing sentences imposed. Congress made clear that "[t]he Commission shall not be bound by such average[s]," because "in many cases, current sentences do not accurately reflect

priate in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of a term of imprisonment, . . . could play a role in determining in which prison facility a defendant might be incarcerated." S. Rep. No. 98-225, at 174.

⁴⁷ The legislative history supplies detailed guidance for these factors. For example, the "criminal history . . . factor includes not only the number of prior criminal acts—whether or not they resulted in convictions—the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a 'career criminal' or a manager of a criminal enterprise." S. Rep. No. 98-225, at 174.

the seriousness of the offense." 28 U.S.C. § 994(m).⁴⁸ Nevertheless, Congress's directive to use historical averages "as a starting point," 28 U.S.C. § 994(m), created an initial presumption in favor of prevailing norms to focus the Commission's discretion.⁴⁹

Second, Congress placed the Commission in a professional, administrative, and political context to ensure continued guidance to the Commission. Congress instructed the Commission "to consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system" and periodically to "review and revise" the guidelines "in consideration of comments and data coming to its attention." *Id.* § 994(o).⁵⁰ Congress also made notice-and-comment procedures, 5 U.S.C. § 553, applicable to the promulgation of guidelines. 28 U.S.C. § 994(x). Congress provided a final measure of control over the Commission by requiring that the initial guidelines and all amendments be submitted to Congress six months before going into effect to permit Congress to delay, modify, or disapprove them by legislation. 18 U.S.C. § 3551 note; 28 U.S.C. § 994(p). This "report

⁴⁸ The Senate Judiciary Committee gave specific examples of areas in which prevailing sentences might be deficient, including too lenient treatment of major white collar criminals. S. Rep. No. 98-225, at 177. It is thus untrue that the Commission's treatment of white collar crime "was not guided by a mandate from Congress." *Mistretta Br.* 50.

Congress's commitment to eradicating discrimination barred use of a strict historical basis. See Fisher & Kadane, *Empirically Based Sentencing Guidelines and Ethical Considerations*, in 2 Nat'l Res. Coun., *Research on Sentencing: The Search for Reform* 184 (1983) (difficulty of purging improper factor such as race from empirically based guidelines).

⁴⁹ Congress reinforced the guidelines' ties to prevailing sentencing practices by directing the Commission to "take into account" the availability of prison facilities and "to minimize" prison overcrowding. *Id.* § 994(g).

⁵⁰ The Probation System, the Bureau of Prisons, the Judicial Conference, the Criminal Division of the Justice Department, and the Federal Public Defenders Service were directed to submit comments on the guidelines and to suggest changes. *Id.*

and wait" process guarantees Congress's opportunity "to stay in the fray, as it should."⁵¹

C. Congress Placed the Commission in the Judicial Branch to Respect the Judiciary's Preeminent Role in Sentencing

Unlike Congress's typical delegation of authority that it had previously exercised legislatively, in the Sentencing Reform Act Congress delegated authority to structure decisionmaking previously exercised largely by individual district courts, not by Congress. Primarily for that reason, Congress "established [the Commission] as an independent commission in the judicial branch." *Id.* § 991(a). Congress "[p]lace[d] . . . the Commission in the judicial branch . . . based upon [its] strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." S. Rep. No. 98-225, at 159. The Department of Justice agreed with the decision, "since the sentencing function that the Commission will be guiding is historically a judicial function, to repose ultimate responsibility for the guidelines in the judicial branch."⁵² The Justice Department observed that, "[i]f guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function and engender a circumspection on the part of sentencing judges that could impede the effective operation of the guidelines." *Id.*

After considerable adjustment,⁵³ Congress settled on a seven-member Commission, including at least three feder-

⁵¹ *Senate Hearing, supra* note 22, Pt. 13, at 8962 (Judge Harold Tyler). Congress also directed the General Accounting Office to study and report to Congress on the guidelines' impact after four years to permit Congress to evaluate whether to alter them. 28 U.S.C. § 994 note.

⁵² *Senate Hearing, supra* note 22, Pt. 13, at 9005 (Act'g Ass't Att'y Gen. Ronald Gainer).

⁵³ *Compare* 128 Cong. Rec. 26512, 26515, 26581, 26598 (1982) (deleting requirement that 3 members be judges) *with* S. Rep. No. 98-223, at 156 (restoring requirement that 2 members be judges) *and* 130 Cong. Rec.

al judges. 28 U.S.C. § 991(a).⁵⁴ Congress believed that including judges and others on the Commission would ensure that "sentencing policy [w]ould be formulated after examining a wide spectrum of views." S. Rep. No. 98-225, at 159. Congress vested authority to appoint the Commission in the President with the advice and consent of the Senate and, for the three judge-members, "after considering a list of six judges recommended to the President by the Judicial Conference." 28 U.S.C. § 991(a).⁵⁵ Congress prescribed Presidential appointment with confirmation to obtain "the highest quality of membership." S. Rep. No. 98-225, at 160. Directing the President to consider judges recommended by the Judicial Conference "enable[s] judges to participate in, without controlling, the process of establishing and adjusting the sentencing guidelines and to lend their expertise and experience to that process." 130 Cong. Rec. S527 (Jan. 31, 1984) (Sen. Laxalt).

Presidential appointment also ensured adherence to the Appointments Clause, Art. II, sec. 2, cl. 2, of the Constitution. Initially, the Senate Judiciary Committee had bridged the gulf between proposals for the Judicial Conference to appoint the Commission⁵⁶ and bills providing for Presidential appointment⁵⁷ by combining the two approaches and permitting the President to appoint four members with confirmation and the Judicial Conference to designate three members.⁵⁸ The Committee believed

S13077, S13384, S13520 (Oct. 4, 1984) (restoring requirement that 3 members be judges).

⁵⁴ The Attorney General's designee and the Chairman of the Parole Commission are nonvoting members. *Id.*; 18 U.S.C. § 3551 note.

⁵⁵ Congress required the President to appoint on a bipartisan basis "after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process." *Id.*

⁵⁶ *E.g.*, S. 2699, 94th Cong., 1st Sess. § 5 (1975); S. 1437, 95th Cong., 1st Sess. § 241 (1977) (as introduced).

⁵⁷ *E.g.*, S. 204, 95th Cong., 1st Sess. § 4(a)(1) (1977).

⁵⁸ S. 1437, 95th Cong., 1st Sess. § 124 (1977) (as reported).

that participation by the President and the Senate, in addition to the judiciary, in selecting the Commission would reflect "the other branches[]" . . . strong interest in assuring fair and effective sentencing" and "assure a broadly representative membership" on the commission. S. Rep. No. 95-605, Pt. 1, at 1159.

In response to an objection that appointment by the Judicial Conference was improper under the Appointments Clause and *Buckley v. Valeo*, 424 U.S. 1 (1976),⁵⁹ Senator Gary Hart offered an amendment specifying Presidential appointment after recommendations of the Judicial Conference. 124 Cong. Rec. 377 (1978). Senator Hart explained that his proposal would ensure that the Judicial Conference's "recommendations are considered" and provide "greater assurance that a broad range of interests will be represented. . . . Sentencing is an important concern of the Congress. If we are to delegate this important responsibility, we must at least play a major role in deciding who assumes that responsibility." *Id.* at 378. Although Department of Justice analysis "satisfied [Senator Kennedy] that there is no constitutional issue," he accepted the amendment, which "insures the input of the Judiciary and also preserves the Presidential authority in making the appointment," while "cur[ing]" any constitutional question. *Id.* The Senate accepted the amendment, *id.* at 381, which was carried forward in the Sentencing Reform Act.⁶⁰

* * * * *

⁵⁹ Senator William Scott argued that commission members were not "inferior Officers" who could be appointed by "the Courts of Law," and that, if they were, the Judicial Conference was "an association of judges, not a court" within the meaning of the Clause. 124 Cong. Rec. 296-97 (1978).

⁶⁰ The President was also given the power to remove members of the Commission "only for neglect of duty or malfeasance in office and for other good cause shown." 28 U.S.C. § 991(a). Congress vested removal authority in the President not to give him supervisory authority or control over the Commission, which, after all, it deliberately "es-

Continued

Defendant claims that the Sentencing Reform Act is not entitled to the normal presumption of constitutionality because separation of powers questions he presents were not considered by the Congress. *Mistretta* Br. 13-14. The history of the Act shows that the Congress strove to resolve problems relating to fundamental constitutional values. The effort to eliminate arbitrary and invidious disparities in sentencing is, at its heart, an effort to imbue sentencing practices with the values of the due process clause, by implementing that clause's command of equal protection in a manner consistent with the imperatives of proper individualization. To achieve that goal, the Congress has created a system that not only respects the roles of the separate branches, but creatively draws upon the special strengths of each. A fair reading of the history of Congress's efforts shows that the presumption of constitutionality has been well earned.

CONCLUSION

The constitutionality of the Sentencing Reform Act should be sustained.

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established as an independent commission in the judicial branch." *Id.* Rather, originally, when a split appointment mechanism had been contemplated, the Senate Judiciary Committee had provided for Commission members to be removed by the respective "authority appointing or designating them only for malfeasance in office." S. 1437, 95th Cong., 1st Sess. § 124 (1977) (as reported). Accordingly, when Congress shifted all appointment authority to the President, it also transferred to him removal responsibility. 124 Cong. Rec. 380 (1978).

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Nos. 87-1904 and 87-7028

Supreme Court, U.S.
FILED

AUG 29 1988

JOSEPH E. SPANGL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Writ of Certiorari Before Judgment to the
United States Court of Appeals
for the Eighth Circuit**

**BRIEF FOR THE
UNITED STATES SENTENCING COMMISSION
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

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QUESTIONS PRESENTED

The United States Sentencing Commission is an "independent commission in the judicial branch of the United States" having as members three judges and four non-judges; under the Sentencing Reform Act of 1984 it has delegated power, subject to statutory standards, to issue (and thereafter review and revise) determinate sentencing guidelines to order and equalize the sentencing decisions of the federal courts.

The questions addressed in this *amicus curiae* brief are whether it violates principles of separation of powers for Congress

(1) to delegate power to issue rules to govern the sentencing discretion of the federal courts to an *independent* commission, free from policy control by the prosecutorial authorities;

(2) to assign the commission to the judicial branch in order to safeguard this independence;

(3) to provide that its membership must include three federal judges, but may include as well four persons from other fields; and

(4) to provide that all commissioners are to be appointed by the President (subject to Senate confirmation) and that all commissioners may be removed as commissioners by the President, but "only for neglect of duty or malfeasance in office or for other good cause shown."

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**BRIEF FOR THE
UNITED STATES SENTENCING COMMISSION
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

INTEREST OF THE AMICUS CURIAE

The United States Sentencing Commission has a direct interest in the constitutionality of the statute that established it and the sentencing guidelines that are its principal work. The parties have consented to the Commission's submission of this brief; Justice Blackmun has granted the Commission leave to file a brief not exceeding 50 pages; and this Court has given leave to the Commission to participate in the oral argument of this case.

INTRODUCTORY STATEMENT

In the Sentencing Reform Act of 1984, Congress created the United States Sentencing Commission—an “independent commission in the judicial branch of the United States” having as members both judges and non-judges—and delegated to it, subject to statutory standards, the task of issuing (and thereafter monitoring and amending) determinate sentencing guidelines to order and equalize the sentencing decisions of the federal district courts. The question in this case is whether the Constitution is violated by Congress' considered judgment that the judicial branch and the federal judges should thus play a central role in this effort to bring equality and predictability to the judicial task of imposing sentence.

More specifically, the issues before this Court are whether Congress may (i) delegate the power to issue rules to govern the sentencing discretion of federal judges to an *independent* commission, free from control by the prosecutorial authorities; (ii) assign the commission to the judicial branch in order to guarantee this independence; (iii) ordain that its membership must include three

federal judges but may include, as well, as many as four persons from other fields; (iv) provide that all of the members are to be appointed by the President subject to Senate confirmation; and (v) provide that the members may be removed by the President, but "only for neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a).

Mistretta (hereafter "Petitioner") claims that the Commission's principal function—issuing sentencing guidelines through rulemaking—may not be delegated to the "Judicial Branch" or to "Article III courts" or to "Article III judges." (Petitioner persistently uses these terms as if they were simply interchangeable.) He asserts that the power to formulate rules, once delegated by the legislature, becomes an exclusively *executive* function. Further, Petitioner argues, Article III judges are prohibited by the Constitution from serving on the Commission whether it is in the judicial branch, is in the executive branch, or is simply an independent agency. On the other hand, if the Constitution permits judges to serve on the Commission, then *non-judges* may not serve with them, because such interbranch cooperation violates the separation of powers. And Congress violated the Constitution yet again by giving the President power to remove members for "good cause shown," because an officer of one branch may not be removed by the head of a different branch.

As if this were not enough, Petitioner completes the magic circle by suggesting that the task of issuing sentencing guidelines may not, under the Constitution, be delegated even to a purely executive agency in the executive branch, because this would "unite in one branch the power to prosecute with the power to decide the proper sentence" (Br. 35 n.9). Petitioner thus achieves perfect constitutional gridlock: if Congress wishes to subject sentencing discretion to a regime of rules, it has no choice other than to undertake itself the continuing task of formulating, monitoring and fine-tuning these rules.

The Commission's position, in contrast, is that under principles of separation of powers as developed by this Court, Congress acted wholly within the letter and spirit of the Constitution—as well as with eminent good sense—when it created an independent commission in the judicial branch to undertake the special task of creating rules, under statutory standards, to order and rationalize the preexisting (and virtually unfettered) sentencing discretion of federal judges. It was valid and appropriate for Congress to delegate to an expert specialized body, rather than to undertake itself, the massive task of collecting and analyzing data on historic sentencing practices in order to develop detailed guidelines, and the additional task of continuously reviewing and revising these in the future; to create a diverse Commission, drawing on the expertise of the federal judiciary but also authorizing the inclusion of persons from other disciplines (*e.g.*, corrections; economics; sociology); to specify that the Commission should be “independent,” so that the sensitive functions it performs will be free from undue influence by prosecutorial (or defense) interests; to guarantee the Commission's independence and to underscore the judicial center of gravity of its mission by locating it in the judicial branch; and to give the President a limited check on clear abuse of office by a particular commissioner through the power (routinely associated with independent agencies) to remove commissioners, but only for “good cause shown.”

In fact there do not exist rules of constitutional law that would invalidate this carefully thought out congressional scheme. The Sentencing Reform Act does not disobey the constitutional text, or make fundamental changes in accepted constitutional practice, or subvert the principles of separation of powers as these have been developed by this Court. Rather, the constitutional “violations” that have allegedly occurred involve rules invented for purposes of this litigation, based on separation-of-powers syllogisms having no real constitutional provenance.

A. Federal Sentencing: The Background

1. Perhaps the single most important thing about this case is that it concerns *sentencing*. This is critical because sentencing—the function of determining the scope and extent of punishment—has, historically, never been thought to be assigned by the Constitution to the exclusive jurisdiction of one of the three branches. The Constitution does not require that the sentence be defined exclusively by the legislature, or by the judiciary, or by the executive.¹ Rather, for almost 100 years our constitutional practice and theory of sentencing have featured a “three-way *sharing of responsibility*” (*Geraghty v. United States Parole Comm’n*, 719 F.2d 1199, 1211 (3d Cir. 1983), cert. denied, 465 U.S. 1103 (1984) (emphasis added)) for determining what sentence should be meted out to a federal defendant. The Sentencing Reform Act simply continues that tradition through a new, more carefully designed and ordered, methodology.

Thus, although it is settled that Congress has the power to fix the sentence for each federal crime, see, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), and that the scope of judicial discretion with respect to sentences is subject to plenary congressional control, *Ex parte United States*, 242 U.S. 27 (1916), early in our history Congress abandoned the “excessive rigidity” of a system of fixed statutory punishments. *United States v. Grayson*, 438 U.S. 41, 45 (1978). Congress has continued to prescribe by statute the maximum (and occasionally the minimum) sentence; but for more than a century Congress has delegated virtually unfettered discretion to federal judges to determine what the sentence should be within that (typically) wide range. It has been the federal judge who has exercised the effective law-making power to decide what are the various goals of sentencing, what are the relevant aggravating

¹ *Imposing* sentence is, of course, a judicial function. But our references in this brief to the function of “sentencing” include the overall function of deciding what the punishment should be.

and mitigating circumstances, and how these factors should be combined in determining a specific sentence. And this large-scale discretion was thereafter substantially enhanced by the power granted to the courts to suspend the sentence and by the resulting growth of an elaborate probation system (administered within the *judicial* branch) for supervising defendants whose sentences had been conditionally suspended.²

In 1910, responding to advocates of sentencing reform who urged a "flexible sentencing system" permitting correctional experts to release prisoners according to "their potential for, or actual, rehabilitation," *Grayson*, 438 U.S. at 46, Congress took a major step toward a "three-way" sharing of sentencing responsibility by creating a parole system, under which executive-branch correctional personnel were given the discretionary authority to release prisoners before the expiration of the term imposed by the judge. The result was a regime of indeterminate sentences, under which Congress defined a statutory maximum, the judge imposed a sentencing range (which the judge could suspend and replace with supervised probation), and executive branch (parole) officials eventually determined the actual length of imprisonment. See *Williams v. New York*, 337 U.S. 241, 248 (1949); *United States v. Addonizio*, 442 U.S. 178, 188-189 (1979).

² The Federal Probation Act, 18 U.S.C. § 3651 (1982), authorized probation for all offenses except those punishable by death or life imprisonment and made probation available even where Congress had provided for a mandatory minimum sentence. See *Rodriguez v. United States*, 107 S. Ct. 1391 (1987) (per curiam). The probation system is administered by an elaborate corrections and enforcement bureaucracy housed in the judicial branch and supervised by the courts. See Annual Report of the Director of the Administrative Office of the United States Courts 41-50 (1986). The Sentencing Reform Act preserved the basic structure of the probation system (see 18 U.S.C. §§ 3601-3606) but made probation subject to the guidelines. See 28 U.S.C. § 994(a)(1).

2. The federal system of indeterminate sentences conferred vast discretion on sentencing judges. The absence of any standards to guide this "unfettered" discretion, *Dorszynski v. United States*, 418 U.S. 424, 437 (1974), together with the fact that sentences were usually unreviewable, led to serious disparities in sentences.

Congressional dissatisfaction with these disparities dates at least to 1958, when Congress authorized the creation of judicial sentencing institutes and joint councils to formulate standards and criteria for sentencing. 28 U.S.C. § 334(a). The purely advisory character of these measures sharply limited their efficacy, however. In an effort to address the problem, the Parole Board in 1973 adopted parole guidelines that established "a 'customary range' of confinement." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 391 (1980). Congress endorsed this initiative in the Parole Commission and Reorganization Act of 1976 ("PCRA"), 18 U.S.C. §§ 4201-4218. The PCRA did not, however, disturb the basic division of sentencing responsibility among the three branches: the sentencing judge continued to exercise plenary discretion to set a maximum and minimum term within the statutory range, while the prisoner's actual release date was generally set by the Parole Commission.

B. The Sentencing Reform Act

1. Fundamental dissatisfaction with the uncertainties and disparities of the federal system of indeterminate sentences became a major focus of public concern in the early 1970s. Congress came to believe that the existing system suffered from major flaws. "[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." These disparities, which are "unfair both to offenders and to the public," can be "traced directly to the unfettered discretion the law confers on * * * judges and parole authorities." "By dividing the sentencing author-

ity between the judge and the Parole Commission" the existing system engenders pervasive "uncertainty about the length of time offenders will serve in prison." "[S]entencing judges and the Parole Commission second-guess each other, often working at cross-purposes." The resulting system "lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime." S. Rep. No. 225, 98th Cong., 2d Sess. 38, 45, 38, 46, 49, 113, 49-50 (1984) ("S. Rep.").

As a result of these concerns, there commenced a prolonged bipartisan effort to reform the federal sentencing system. Four different administrations participated in that effort. The bills that became the Sentencing Reform Act were sponsored by leading members from a broad cross-section of each party and received the strong endorsement of the Reagan Administration. The Act was adopted by overwhelming majorities of both houses as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837. Attorney General William French Smith described the Act as "the most far-reaching, substantial reform of the federal criminal justice system ever enacted by the Congress," while Senator Kennedy described it as "a comprehensive and far-reaching new approach * * * [designed to] reduce the unacceptable disparity of punishment that plagues the federal system, and * * * to assure sentences that are fair—and perceived to be fair—to offenders, victims, and society." 32 Fed. B. News & J. 60, 62, 65 (1985).

2. Congress sought to solve the problems of the old sentencing system by enacting three fundamental reforms: (1) it replaced the standardless discretion of prior law with statutory guidance as to sentencing goals and as to the factors relevant to sentencing; (2) it determined that the discretion of judges should be confined by sentencing guidelines, and that these should be definitively applied by judges at the time of sentencing, rather than having terms of imprisonment determined later by parole officials; and (3) it provided for limited appellate review of sentencing.

The new statute is unprecedented in the degree to which Congress itself made the basic structural and policy decisions that shape the sentencing system. Congress continued the practice of setting maximum terms of imprisonment by statute. It enacted new maximums for fines and probation, and created a new system of supervised release following imprisonment. See 18 U.S.C. § 3583. It provided substantive guidance by specifying the purposes of sentencing that must be considered by the Commission in formulating sentencing guidelines (28 U.S.C. § 991(b)(1)(A)) and by the court in imposing sentence (18 U.S.C. § 3553(a)(2)). It established "two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced"—as the principal determinants in sentencing. S. Rep. 161. The guidelines must establish a sentencing range "for each category of offense involving each category of defendant;" that range must be "consistent with all pertinent provisions of title 18;" and any range of imprisonment may vary by no more than 25% or 6 months from the minimum to the maximum. 28 U.S.C. § 994(b).

In addition, a critically important directive instructed the Commission, "as a starting point in its development of the initial sets of guidelines," to ascertain existing sentences in each category of cases. 28 U.S.C. § 994(m). Thus the Commission was given a vital initial framework for reaching decisions about sentence levels.

3. The Act reduces, but does not eliminate, the sentencing judge's discretion. Where unusual circumstances are present, the judge may depart from the guidelines. 18 U.S.C. § 3553(b). Judges also retain full discretion to determine what sentence is appropriate within the range specified in the guidelines, leeway in deciding what conditions of probation are appropriate (see 18 U.S.C. § 3563(b)), and authority to accept or reject a plea agreement. At the same time, by abolishing parole the Act removes a significant limitation on the sentencing judge's authority.

To make the guideline system effective, Congress required that judges explain their sentences and provided for appellate review. The defendant (or the government) may appeal a sentence that is more severe (or more lenient) than the applicable guideline, and either party may appeal an incorrect application of the guidelines. 18 U.S.C. § 3742. If the sentence is "outside the range of the applicable sentencing guideline," the court of appeals must determine whether it is "unreasonable." 18 U.S.C. § 3742(d)(3). Congress contemplated that if the case was an "entirely typical" one, the court would have "no adequate justification for deviating from the recommended range." S. Rep. 79. But departures would be permissible where the judge "conclude[s] that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance." *Id.* at 52.³

4. The Sentencing Reform Act also gives the Commission the continuing mission "periodically [to] review and revise" the sentencing guidelines. 28 U.S.C. § 994(o). The Commission is under a continuing obligation to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress on amendments to the guidelines (§ 994(p)), inform Congress whether the grades or maximum penalties of specified offenses should be modified (§ 994(r)), monitor and analyze the operation of the guidelines (§ 994(w)), and issue "general policy statements regarding application of the guidelines" (§ 994(a)(2)). The Commission is also expected to monitor and issue instructions to pro-

³ The Commission has said that it "intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." United States Sentencing Commission, *Federal Sentencing Guideline Manual* 6 (West 1988) ("Guidelines").

bation officers with respect to the guidelines, to conduct training programs for judicial and probation personnel, and to perform "such other functions as are required to permit Federal courts to meet their [sentencing] responsibilities." 28 U.S.C. § 995(a).

The monitoring function under these provisions is a particularly massive one. Each year, with respect to some 40,000 sentences, the federal courts must forward, and the Commission will review, the presentence report, the sentencing guideline worksheets, the court's sentencing statement, and any written plea agreement. These sentencing documents must be tabulated and analyzed, and will then be the basis of amendments to the guidelines and reports to Congress.

C. The Work Of The Commission

In promulgating the initial Sentencing Guidelines, the Commission took its bearings from the congressional goals of certainty, uniformity and proportionality in sentencing. The Commission proceeded from the requirement that it examine average sentences "as a starting point;" it examined data drawn from some 40,000 recent sentences (including more detailed analysis of 10,000 presentence investigations)—"to determine which distinctions are important in present practice;" it then "accepted, modified, or rationalized" those distinctions. Guidelines 4. This approach enabled the Commission to develop "relatively broad" categories that will make the guidelines manageable while capturing significant differences. *Ibid.* The Commission did not simply copy "existing practice" (*ibid.*); but it is also clear that it did not write on a blank page: its discretion was meaningfully channeled by the Act's requirement that it use existing average sentences "as a starting point." 28 U.S.C. § 994(m).

The Commission's approach to its task, the resulting guideline system, and the relationship of these to Congress' statutory purposes, are described in more detail in the briefs submitted by the other *amici curiae* (in support of affirmance).

D. The Placement And Composition Of The Sentencing Commission

Congress established the Sentencing Commission "as an independent commission in the judicial branch of the United States" (28 U.S.C. § 991(a)). The Commission's seven voting members are appointed by the President with the advice and consent of the Senate. The Act requires that "[a]t least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States." *Ibid.*

Congress' decision on how to constitute the Commission was carefully considered. Congress made it clear that it did not wish the Commission to be an executive branch agency:

Traditionally, the courts and Congress have shared responsibility for establishing Federal sentencing policy. Congress defines criminal conduct and sets maximum sentences, while the courts impose sentences in individual cases. Any suggestion that the Executive Branch should be responsible for promulgating the guidelines would present troubling constitutional problems. More importantly, it would fundamentally alter the relationship of the Congress and the Judiciary with respect to sentencing policy and its implementation. Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

⁴ Congress gave the executive branch a voice in the formulation of the guidelines by specifying that a designee of the Attorney General, together with the Chairman of the United States Parole Commission, should be *ex officio* members of the Commission; but it underscored the independence of the Commission by making these commissioners non-voting members. 28 U.S.C. § 991(a); Pub. L. No. 98-473, § 235(a)(2).

H.R. Rep. No. 1017, 98th Cong., 2d Sess. 94-95 (1984) (footnotes omitted).⁵

On the other hand, Congress also made a deliberate decision not to make the Commission a body entirely composed of judges or controlled by the courts. The Judicial Conference had proposed that the guidelines be issued by the Conference after considering the recommendations of a Committee appointed by the Conference and consisting of a majority of judges. Congress rejected that approach:

[The Act] requires all three branches of government, rather than only the judicial branch, to participate in the selection of members of the Sentencing Commission. This permits legislative branch participation in the selection of members of the body to which Congress will be delegating some of its authority to set sentencing policy. Presidential appointment of the members assures high visibility of the Commission, which the Committee thinks is important to the Commission's role in guiding this extensive change in Federal sentencing policy. Finally, the [Act] does assure the judiciary a role in the selection of the members and does place the Commission in the judicial branch. S. Rep. 64.

Thus the Commission is not under the control of the Judicial Conference or any other entity in the judicial branch. It is exactly what Congress said it is: an "independent" Commission.

What, then, is the purpose and significance of the legislative designation of the Commission as being "in" the "judicial branch"? It goes without saying that that designation in no way attempts to vest the Commission with any share of "the judicial Power of the United

⁵ The House Report was attached to a version of the statute (H.R. 6012) that would have placed the Commission under the control of the Judicial Conference. This model was ultimately rejected. But the statute as enacted carried forward the House's decision not to make the Commission an executive branch agency. The reasons stated for that conclusion in the House Report thus carry continuing authority.

States.” Like many other auxiliary institutions—the Administrative Office; the Probation Service; the Judicial Councils—the Commission is “in” the judicial branch but is not a court and has no jurisdiction to perform Article III adjudicatory functions.

The designation of the Commission as being in the judicial branch can be seen in part as a “housekeeping” measure governing budgetary and administrative matters and the applicability of various statutes.⁶ Notwithstanding Petitioner’s innuendo to the contrary (Br. 38-40), in this respect the designation is constitutionally unproblematic; there can be no doubt of Congress’ power to determine whether the Commission should be covered by *statutory* provisions governing the executive departments.

The historic expertise of the federal judiciary in matters concerned with sentencing was also highly relevant to Congress’ decision. So was Congress’ obvious realization that the Commission’s continuing oversight and educational roles would place it in daily contact with the federal judicial system at an operating level: with judges, clerks of court, probation officers, federal magistrates, the Judicial Councils, the Judicial Center, and the Administrative Office. See pp. 9-10, *supra*. Given the daily grist of the Commission’s ongoing business, the sheer administrative convenience of its placement in the judicial branch goes far to support Congress’ decision.

But the designation of the Commission as being in the judicial branch has a deeper significance. Congress was acting on its “strong feeling that, even under this legislation, sentencing should remain primarily a judicial function.” S. Rep. 159. The power to impose punishment is a judicial power: only the courts may subject a person to a lawful deprivation of liberty or property. *Ex parte United States*, 242 U.S. at 41. Congress thus

⁶ For example, the Administrative Procedure Act’s definition of “agency,” 5 U.S.C. § 551, excludes “the courts of the United States.” Congress assumed that this exclusion applies to the entire judicial branch. See S. Rep. 180.

properly concluded that, historically, the center of gravity of the sentencing power is located in the judicial branch, and that responsibility for implementing the decision to create a new system of determinate sentences should, accordingly, be centered there as well.

Equally important was the focused congressional wish that the Commission not be subservient to the policy directions of the President. See H.R. Rep. No. 1017, *supra*, at 94-95. Congress realized that to unite the functions of creating sentencing guidelines with the President's prosecutorial power would strike many as a threat to liberty. The placement of the Commission in the judicial branch can thus be seen as a purposeful way of underlining and guaranteeing the Commission's independence.⁷

Overall, the Commission's placement and composition show how carefully Congress fine-tuned this institution to reflect all of the historic elements of our sentencing traditions. Congress reaffirmed its own role as creator of fundamental sentencing policies and standards. The placement of the Commission in the judicial branch and the inclusion of federal judges in its membership reflect Congress' awareness that the Commission's ongoing task is to help order and rationalize what had been for a century an essentially *judicial* enterprise. By giving the President the power to appoint commissioners, and allowing him to choose as many as four non-judges, Congress not only followed the conventional constitutional pattern for appointments (including those of judges and members of independent agencies), but also gave recog-

⁷ The importance of this designation and the Commission's resulting independence from executive control was manifested in practice when the Commission decided not to comply with the Justice Department's request that it issue guidelines with respect to the death penalty. Without formally deciding whether or not it had the authority to issue such guidelines, the Commission declined to do so when it rejected this proposal on March 10, 1987. Contrary to Petitioner's suggestion (Br. 51-52), what this confirms is not the breadth of the delegation to the Commission but the extent of its independence from executive control.

nition to the historic participation of the executive branch in sentencing determinations. And in assuring the Commission's independence by locating it in the judicial branch and by limiting the President's removal power to "good cause shown," Congress sought to guarantee that the sentencing function, so crucial to the administration of justice in our courts, would not be united with the power to prosecute and would not be otherwise subject to partisan or political control.

SUMMARY OF ARGUMENT

Under the principles of separation of powers as these have been developed by this Court, the Sentencing Reform Act is constitutional. Petitioner's attempt to show the contrary depends crucially on his persistent practice of collapsing settled distinctions between the separation-of-powers rules that govern the Article III *courts* acting as courts, those that govern the activities of federal *judges* acting as individuals, and those that govern auxiliary agencies housed in the *judicial branch* but not exercising the federal "judicial Power." Using the terms "judicial branch," "federal courts" and "federal judges" as if they were interchangeable, Petitioner misreads this Court's holdings and distorts its formulations.

A. This Court's separation-of-powers cases make it clear that where a congressional scheme does not violate the constitutional text, and the danger-signal of congressional aggrandizement is not present, a "pragmatic, flexible" approach should be taken to the critical questions whether Congress' plan prevents any branch from "accomplishing its constitutionally assigned functions" (*Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977)), or whether any branch has been assigned tasks that are "incongru[ous]" (*Ex parte Siebold*, 100 U.S. (10 Otto) 371, 398 (1880)) or "are more properly accomplished" by another branch. *Morrison v. Olson*, 108 S. Ct. 2597, 2613 (1988).

Under that standard, the Sentencing Reform Act is constitutional. The Act does not involve congressional

aggrandizement; nor does it violate the constitutional text. Indeed, the Act deals with a function—defining the appropriate punishment for crime—that the Constitution does not itself assign to the exclusive jurisdiction of any one branch and that has for a century been a shared responsibility among the three branches.

B. (1) The delegation to the Commission of power to make rules to channel the sentencing discretion of federal judges does not disrupt the performance of the constitutionally assigned functions of the *executive* branch. The claim that rulemaking is an exclusively “executive” power is wrong, ignoring 200 years of history during which Congress has delegated rulemaking power to courts, to independent agencies, and to other entities, entirely according to its judgments as to what institution is most appropriately concerned with the governance of the subject matter addressed by those rules. *Humphrey’s Executor v. United States*, 295 U.S. 602, 628 (1935), rejected the claim that functions such as rulemaking are the exclusive prerogative of the executive branch; see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). And *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), leaves untouched the long-standing tradition of valid delegations of rulemaking power to the judicial branch.

(2) Nor does the delegation to the Commission threaten the constitutional mission of the *judicial* branch. The proper functioning, impartiality, and independence of the federal courts in deciding cases and controversies are not affected by the Act. Since the Commission is not controlled by the courts, no problem of “uniting” policy-making power with judicial power so as to endanger liberty is presented here. The Act reflects Congress’ considered judgment that the threat to liberty would arise, if at all, from uniting power over sentences with the executive’s power to prosecute.

The Act does not assign an “incongruous” or “inappropriate” task to the judicial branch. For almost 200 years, federal judges have been creating federal sentencing

policy, determining the severity of punishments within broad statutory ranges. Congress has now decided that sentencing policy should henceforth be developed through a more ordered and rational methodology. If Congress may constitutionally delegate to individual judges the power to prescribe the punishment for crime—(subject to statutory maxima), it is free to circumscribe that delegation by authorizing a mixed commission in the judicial branch to issue sentencing guidelines subject to the same maxima.

(3) Petitioner's abstract syllogism—the judicial branch may not make *substantive* rules; sentencing guidelines are *substantive*—should be rejected. The critical question is not whether sentencing rules are substantive or procedural, but whether they concern a subject matter that is historically and functionally appropriate for rulemaking by an independent commission housed in the judicial branch. In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court held that Congress has wide discretion under the Constitution to classify rules for purposes of delimiting its power to delegate rulemaking authority to the federal courts. That ruling is determinative here. And the Court does not have to deal today with remote and imaginary cases involving other sorts of rulemaking powers.

C. The mixed composition of the Commission is constitutionally unproblematic. An unbroken tradition establishes the settled understanding that extrajudicial service by federal judges acting as individuals raises no constitutional question. Nor does there exist any constitutional rule against Congress creating an auxiliary agency within the judicial branch that aids the performance of the courts' Article III mission and that enlists the services of non-judges as well as judges.

D. The President's limited power to remove Commissioners "only for neglect of duty or malfeasance in office or for other good cause shown"—a power that leaves intact the judge-commissioners' tenure as judges—does not

violate the separation of powers. No absolute rule against interbranch removals has ever existed. Rather, the question is whether the *particular* removal provision makes an officer "subservient" to another branch. *Bowsher*, 106 S. Ct. at 3189. In the Sentencing Reform Act Congress, acting on the understanding (settled since *Humphrey's Executor*) that a "good cause" removal provision safeguards rather than subverts an officer's independence from the President's policy control, made it clear that it wished to insulate the Commission from control by "the same branch of government that is responsible for * * * prosecution" (H.R. Rep. No. 1017, *supra*, at 95); to read the removal provision as making the Commission "subservient" would be to defy Congress' intent. The Act's removal provision, wholly unlike the aggrandizing removal provision elaborately explicated by this Court in *Bowsher*, is a routine housekeeping measure designed to give the President only the conventional power to deal with clear abuse of office by individual commissioners.

ARGUMENT

The Sentencing Reform Act of 1984 and the guidelines issued under it come to this Court as the product of a major bipartisan (and inter-branch) cooperative effort to improve the administration of criminal justice in the federal courts. A heavy burden of proof falls, therefore, on those who would undo the fruits of this effort; the presumption of constitutionality has a special and forceful claim where the statute under attack is the result of a prolonged, meticulously considered consensus.

In order to prevail, therefore, Petitioner must do more than declaim a series of postulates drawn from his intuitions about what a system of separated powers should be. Petitioner must demonstrate that *our* Constitution and *our* system of separated powers, viewed in the light of history and precedent, prohibit Congress from authorizing the Commission to perform a delegated function—the issuance of rules to govern sentencing within a congress-

sionally-prescribed range—that the Constitution itself does not exclusively assign to any one branch.

No such demonstration has been or can be made. In fact the most striking feature of Petitioner's brief is that it is wholly silent on the question of what *principles* govern the question whether a particular congressional design violates the separation of powers: the brief simply ignores the standards developed by this Court to govern separation-of-powers questions. Rather, the methodology of the brief is to interweave abstract separationist rhetoric with snippets from this Court's cases, and then to promulgate a series of invented rules. The "Judicial Branch" (and/or "Article III Judges" and/or "Article III Courts"), we are told, may not be assigned rulemaking tasks (other than the promulgation of housekeeping rules having no policy consequences), because rulemaking is an exclusively executive power. Individual judges may not serve on the Commission because judicial officers may never perform any "substantive" non-judicial function. A body that includes judges may not also include non-judicial personnel. The President may not be given narrow power to remove members of the Commission for "cause," because no branch may ever be given any power to remove officers of another branch.

But where do these supposed rules come from? They cannot be found in the text of the Constitution or in any accepted course of constitutional practice. And they are not supported by this Court's precedents on separation of powers. An examination of those precedents will in fact show that, under the standards announced by this Court to determine whether Congress has violated principles of separation of powers, the Sentencing Reform Act is clearly constitutional.

I. THE STRUCTURE OF THE SENTENCING COMMISSION IS CONSISTENT WITH SEPARATION-OF-POWERS PRINCIPLES AS THESE HAVE BEEN DEVELOPED BY THIS COURT

The history and structure of the Constitution establish “the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another.” *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). The “purpose of separating and dividing the powers of government * * * was to ‘diffus[e] power the better to secure liberty.’” *Bowsher v. Synar*, 106 S. Ct. 3181, 3186 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Separation-of-powers principles guard against the tendency of government—and of each branch of government—to aggrandize itself at the expense of the people or the other branches. See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The Framers, however, “likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.” *Buckley*, 424 U.S. at 121.

“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

Indeed, the very “checks and balances” that are designed to protect liberties give the branches important roles in each other’s fields of action. The President participates in law-making through his veto; the Senate influences the execution of the laws through its advice-and-consent power over officers nominated by the President, as well as through its participation in the congressional appropriations process; the President appoints, and the Senate must confirm, judges; but the judges have the power to

invalidate statutes passed by Congress and signed by the President. Thus, "the provisions of the Constitution itself" show that "the Constitution by no means contemplates total separation" of the three branches. *Buckley*, 424 U.S. at 121; see also *Morrison v. Olson*, 108 S. Ct. 2597, 2620 (1988). And, as a consequence, this Court's standards for enforcing separation-of-powers requirements have carefully distinguished those cases where there is a genuine (rather than a merely abstract or remote) threat to the constitutional scheme.

1. Where a separation-of-powers claim is based on the specific *text* of the Constitution, the Court has not hesitated to strike down Congress' enactment. *Buckley* and *Chadha* are in point. The Appointments Clause, at issue in *Buckley*, specifies that Congress' sole role in the appointments process is the Senate's power of advice and consent. The Court consequently held that Congress may not give itself the power to appoint members of the Federal Election Commission. 424 U.S. at 124-137. The bicameral requirement and the Presentment Clauses, at issue in *Chadha*, specify "a single, finely wrought and exhaustively considered procedure" for exercising "the legislative power." 462 U.S. at 951. The Court concluded that the legislative veto violated the separation of powers by bypassing these express constitutional requirements for lawmaking. *Id.* at 956-959.

2. The Court has also recognized that separation-of-powers principles are especially likely to be violated in cases involving "an attempt by Congress to increase its own powers at the expense" of another branch. *Morrison*, 108 S. Ct. at 2620; see also *CFTC v. Schor*, 106 S. Ct. 3245, 3261 (1986). Thus this Court's decisions in *Buckley*, *Chadha*, and *Bowsher* gave great weight to the fact of congressional aggrandizement. In *Buckley*, Congress gave itself the power to appoint a majority of the members of the Federal Election Commission; in *Chadha*, Congress gave itself, through the legislative veto, control over the execution of a prior enactment; and in *Bowsher*, Congress retained a wide removal power over an officer

whose functions "plainly entail[] execution of the law in constitutional terms." 106 S. Ct. at 3192.

3. In contrast, where there is no violation of the constitutional text, and no aggrandizement by the acting branch, the Court has rejected the "archaic view of the separation of powers as requiring three airtight departments of government," and has made plain that general separation-of-powers principles must be interpreted in a "pragmatic" and "flexible" manner (*Nixon v. Adm'r of General Services*, 433 U.S. 425, 443, 442 (1977)):

"True, it has been said that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ,' *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935),' * * *.

"But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in *United States v. Nixon*, [418 U.S. 683 (1974)]. * * * [T]he Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Id.* at 441-443.⁸

Under this "pragmatic, flexible" approach, the fundamental test for determining whether a congressional statute violates the separation of powers is "the extent to which [the challenged action] prevents the [affected] Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443 (emphasis added). See also *Morrison*, 108 S. Ct. at 2621 (the test is whether

⁸ In a footnote, the Court quoted Madison's observation, in The Federalist No. 47, that a proper understanding of the separation of powers "d[oes] not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." 433 U.S. at 442 n.5.

Congress' scheme "‘impermissibly undermine[s]’ the powers of the Executive Branch, or ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions’"); *Schor*, 106 S. Ct. at 3258 (rejecting "formalistic and unbending rules" that might "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers"); *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984) ("The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system").

In *Morrison*, the Court further specified that a threat to the "constitutionally assigned functions" of a branch may be created, and the "proper balance" between the branches therefore disrupted, if Congress assigns to a branch functions that "are more properly accomplished" by another branch. 108 S. Ct. at 2613. This theme echoes the Court's indication in *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 398 (1880), that an "incongruity in the duty required" may lead the Court to invalidate an allocation of powers to one of the branches.

Finally, the Court has made it clear that even where there exists a "potential for disruption" of another branch, Congress' scheme will nevertheless pass muster if "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443. This is why the Court has insisted that a pragmatic evaluation be made of the circumstances that led Congress to adopt the statute and the seriousness of its impact on the "institutional integrity" of the affected branch. *Schor*, 106 S. Ct. at 3258; see also *Morrison*, 108 S. Ct. at 2621. "The idea of separation of powers is justified by eminently practical considerations. * * * It is faithful to the idea of separa-

tion of powers to examine the real consequences of the [challenged] statute." *Pacemaker*, 725 F.2d at 546-547.

4. This Court's "pragmatic, flexible" approach to separation-of-powers questions where no textual command of the Constitution is in play and the danger-signal of congressional aggrandizement is absent has another virtue: it pays proper heed to the explicit constitutional authority of Congress to determine how *all* the branches of government should be organized to carry out their respective functions. The Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18 (emphasis added). This specifically authorizes Congress to enact necessary and proper laws to effectuate not only its own enumerated powers, but all the powers of *every* branch of the federal government (including powers that Congress has validly delegated). See *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n:7 (1979). The Constitution assigns to each branch its central mission and its enumerated powers. But the Constitution does not spell out a detailed table of organization; nor does it specify which branch is to perform the various subsidiary and incidental functions needed to round out the operations of the government as a whole.⁹ Rather, the Constitution leaves broad latitude

⁹ As this Court recognized in *Siebold*, 100 U.S. at 397, "it would be difficult in many cases to determine to which department an office properly belonged;" in the Court's example, the marshal is "an executive officer" who is also "pre-eminently the officer of the courts." See also *Morrison*, 108 S. Ct. at 2618 n.28 (discussing "[t]he difficulty of defining * * * categories of 'executive' or 'quasi-legislative' officials"). What is true of officers is true of the functions officers perform. As Justice Stevens observed in his concurring opinion in *Bowsher*, "[o]ne reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized

to Congress to decide what institutions, and what allocation of subsidiary and interstitial responsibilities, will best carry out the constitutional plan for the other branches of government.

5. A flexible approach to separation-of-powers questions, giving proper heed to the pragmatic circumstances that animated Congress, is consistent with the historical evidence of the Framers' philosophy of separation of powers. As recent important research confirms, there did not exist, at the time of the framing of the Constitution, a determinate set of rules that defined when the ideals of separation of powers were or were not satisfied. See generally Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, — Wm. & Mary L. Rev. — (1988) (forthcoming).¹⁰ This is demonstrated, *inter alia*, by the fact that there was wide divergence with respect to constitutional allocations of power in the various state constitutions; and by the fact that many critical issues relating to separation of powers (*e.g.*, power over appointments and the mode of selecting the President) were hotly disputed in the Convention and often not settled until its closing sessions.¹¹ In other words, *there was no positive law of separation of powers* at the time of the framing. Thus, when the Constitution's text does not itself determine how powers are to be divided, the Constitution should not be read by implication to create a rigid table of organization with respect to how the many interstitial and subsidiary functions of

with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." 106 S. Ct. at 3200.

¹⁰ Because this article is in press we have furnished copies to all counsel and lodged copies with the Court.

¹¹ Also relevant are the Convention's many decisions vesting in Congress (or in the executive branch) powers that were not self-defining and could readily have been assigned elsewhere (*e.g.*, the power to declare war, which was a royal prerogative under the English system).

government should be organized. Rather, as this Court has perceived, the question is whether the scheme adopted by Congress *substantially* subverts the independence of one of the branches, or *seriously* disrupts its central constitutional mission. See *Morrison*, 108 S. Ct. at 2621-2622.

6. Obviously, neither the Necessary and Proper Clause, nor a "pragmatic, flexible" approach, authorizes Congress to override an explicit provision of the Constitution. But if there is one thing plain, it is that the text of the Constitution does not explicitly prohibit what Congress did in the Sentencing Reform Act. More particularly, it is critically important to remember that the Constitution does not itself assign the sentencing function to the exclusive jurisdiction of any branch. Indeed, deciding what punishment fits the crime is a paradigm example of a responsibility that has, historically, been *shared* among the three branches. See pp. 4-6, *supra*. Sentencing is thus preeminently a field where interbranch cooperation and sharing of responsibility are appropriate, and where rules must therefore "be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928). And it is precisely in such a field that Congress' discretion to allocate authority and fashion appropriate offices and institutions must be at its greatest.¹²

¹² The point may be illustrated by the administration of probation and parole. Currently, the administration of probation is the responsibility of the judicial branch whereas the administration of parole is the responsibility of the executive branch. Yet, functionally, both probation and parole are forms of supervised release that serve as alternatives to incarceration. There is no reason to think that the current allocation of responsibility is constitutionally compelled. In fact there is considerable interplay between probation officers and the parole authorities. See, e.g., 18 U.S.C. § 3655 (requiring probation officers to "perform such duties with respect to persons on parole as the United States Parole Commission shall request").

Because probation officers are "peace officers" (*Minnesota v. Murphy*, 465 U.S. 420, 432 (1984)), and have "law enforcement" powers such as the power to arrest (*Kimberlin v. United States*

7. Just as it is plain that the Sentencing Reform Act does not violate the text of the Constitution, it is also plain that this case does not in any way involve congressional aggrandizement. Congress created the Commission as an independent agency, free from the policy control of the President (and, for that matter, of the courts). And Congress retained no improper or constitutionally suspect supervising authority over the Commission.

8. The sole remaining inquiry under this Court's cases, then, is whether the functions delegated to the Commission, or its composition, involve a substantial "disruption" (*Schor*) of the ability of one or more branches of government to "accomplish[] its constitutionally assigned functions" (*Nixon*). It is to this inquiry that we now turn. We first examine whether the delegation of powers to the Commission to make rules to govern the sentencing discretion of the courts undermines the performance of the constitutionally assigned functions of the *executive* branch.¹³ Second, we turn to the reciprocal question whether the Act undermines the constitutional scheme regarding the "constitutionally assigned functions" of the *judicial* branch.

Dep't of Justice, 788 F.2d 434, 437 (7th Cir.), cert. denied, 478 U.S. 1009 (1986)), the placement of the probation service in the judicial branch and the courts' powers to supervise (and remove) probation officers, see 18 U.S.C. § 3602, would become constitutionally suspect under Petitioner's rigid version of separation of powers.

¹³ This case presents no serious question of an impairment of the "constitutionally assigned functions" of the *legislative* branch. That question is simply another way of asking whether Congress has made an unconstitutional delegation. As explained in the Brief for the United States, Petitioner's non-delegation argument is plainly insubstantial.

II. CONGRESS MAY AUTHORIZE AN INDEPENDENT COMMISSION HOUSED IN THE JUDICIAL BRANCH TO PROMULGATE RULES TO GUIDE THE SENTENCING DISCRETION OF FEDERAL JUDGES

A. The Delegation Of Rulemaking Power To The Commission Does Not Disrupt The Constitutionally Assigned Functions Of The Executive Branch

The location of the Commission in the judicial branch and its power to promulgate sentencing guidelines do not disrupt the ability of the executive branch to accomplish its constitutionally assigned functions. The judicial branch has always been, and continues to be, centrally involved in sentencing. It therefore cannot be suggested that the *field* in which the Commission acts is wholly or exclusively executive in character. Rather, Petitioner argues that *rulemaking* to guide the delegated sentencing discretion of federal judges is the exercise of an exclusively “executive” power.

1. The notion that rulemaking under a legislative delegation is an “executive” power seems anomalous on its face. The very fact that this is a *delegated* power—that Congress itself could unquestionably enact rules such as the guidelines—shows that rulemaking is not “executive” in the sense that it has “always and everywhere * * * been conducted never by the legislature, never by the courts, and always by the executive.” *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting). Beyond this, Congress’ consistent practice, consistently sustained by this Court, has been to delegate the power to make rules to the institution appropriately concerned with the governance of the subject matter addressed by those rules. Rulemaking power has been delegated in appropriate circumstances to the judicial branch; to independent agencies; to the state legislatures (as in the Assimilative Crimes Act, upheld in *United States v. Sharpnack*, 355 U.S. 286 (1958)); and to the governmental authorities of the District of Columbia and the territories and possessions of the United States. In each case the sole constitutional

issue has been, simply, whether Congress' choice of rule-making institution is an appropriate and reasonable one; the Court has never suggested that Congress may delegate rulemaking power only to institutions that are "executive," that are "in" the executive branch, or that are under the control of the President.

2. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), this Court squarely rejected the proposition that functions such as rulemaking are the exclusive prerogative of the executive. The government argued in that case that the President's power to remove FTC commissioners could not be limited by Congress because the FTC's functions "are not different from those regularly committed to the executive departments." 295 U.S. at 617 (argument for the United States). The Court responded that in "administering the details" of the statute "the commission acts in part quasi-legislatively and in part quasi-judicially. * * * To the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers * * *." *Id.* at 628 (emphasis added).

In *Buckley* the Court reaffirmed this conclusion. In contrast to the Federal Election Commission's "enforcement power"—which the Court found to be a function that "the Constitution entrusts" to the President, 424 U.S. at 138¹⁴—the Court expressly rejected any characterization of the Commission's powers involving "rule-making, advisory opinions, and determinations of eligibility" as exclusively executive. "These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are *more legislative and judicial in nature than are the Commission's enforcement powers*, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive

¹⁴ The Sentencing Commission has no "enforcement" functions or powers.

Branch under the direction of an Act of Congress." *Id.* at 140-141 (emphasis added) (footnote omitted).¹⁵

3. Petitioner relies (Br. 21) on *Bowsher's* holding that an officer controlled by Congress may not participate in "execution of the law in constitutional terms." 106 S. Ct. at 3192. Seizing on the *Bowsher* Court's statement that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law" (*ibid.*), Petitioner points out that the Commission's rulemaking functions involve "interpreting a law enacted by Congress to implement the legislative mandate," and concludes that the Commission's placement in the judicial branch is therefore unconstitutional.

Petitioner's argument is a false syllogism drawn from a wildly inflated premise.

(a) The Court in *Bowsher* did not mean, and could not have meant, that only the executive branch may "interpret" laws in order to "implement" a legislative mandate. That, after all, is what the courts do every day.¹⁶

¹⁵ In *Chadha* the Court stated that rulemaking by executive branch agencies or officials constitutes "Executive action," 462 U.S. at 953 n.16, and therefore is not governed by the Presentment Clauses. But this statement in no way supports the proposition that when a body in the *judicial* branch exercises delegated rulemaking authority it must be seen as performing an exclusively executive function. The Court's statement in *Chadha* was made in response to the contention that rulemaking by administrative agencies constitutes "lawmaking" subject to the Presentment Clauses. The Court rejected that characterization because "administrative activity cannot reach beyond the limits of the statute that created it." *Ibid.* But that is equally true of agencies within the judicial branch. Thus, as applied to the Commission, *Chadha* simply confirms that sentencing rulemaking may properly be delegated by Congress, within the limits of the delegation doctrine, without violating the Presentment Clauses.

¹⁶ Both the Third and Ninth Circuits have rejected this out-of-context reading of *Bowsher*, which would make it unconstitutional for courts to act. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1106 & n.1 (9th Cir. 1988); *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979, 991 (3d Cir. 1986), cert. granted, 108 S. Ct. 1218 (1988).

(b) The only issue facing the Court in *Bowsher* was whether, *as between Congress and the executive*, the functions delegated to the Comptroller General involved "execution of the law in constitutional terms." The Court had no occasion to decide, and did not purport to be deciding, what are the appropriate lines between executive and *judicial* implementations of legislative mandates.

(c) In any event, *Bowsher* did not even involve rule-making. The Comptroller General's duties required him to "exercise judgment concerning facts," "determine precisely what budgetary calculations are required," "determine the budget cuts to be made," and "command[] the President himself to carry out * * * the directive of the Comptroller General as to the budget reductions." 106 S. Ct. at 3192. That is a description, not of rule-making, but of factfinding and enforcement power (to which some authority to interpret the law is a necessary adjunct). Plainly, then, *Bowsher* does not hold that rule-making is an exclusively executive function.

5. *Bowsher* obviously cannot mean that the judicial branch may never engage in rulemaking pursuant to a congressional delegation of authority. Since the beginning, Article III courts have been authorized to promulgate rules on subjects touching the administration, procedures, and operation of the courts. Indeed, so far as we know, the Second Congress' delegation of rulemaking power to the courts with regard to the forms of process and modes of proceedings in cases at law and in equity, Act of May 8, 1792, 1 Stat. 275, 276, antedates by many years the practice of delegating regulatory rulemaking authority to the executive branch or to independent agencies.¹⁷

¹⁷ Judicial rulemaking was approved in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (rulemaking powers pertaining to the operation of the judicial branch may "be done by the legislature," or, alternatively, may be "conferred on the judicial department"). In *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941), the Court upheld the Rules Enabling Act of 1934, 28 U.S.C. § 2072,

Pursuant to the Rules Enabling Act and similar grants of delegated rulemaking power, this Court has promulgated a large range of rules in aid of the federal courts' mission to adjudicate cases and controversies. But if *Bowsher* means that the exercise of delegated rulemaking authority constitutes "execution of the law in constitutional terms," then the various enabling statutes are unconstitutional, as are all rules promulgated thereunder.

6. Since neither the field in which the Commission acts (sentencing) nor the methodology it uses (rulemaking) is inherently or exclusively "executive" in character, it follows that Congress' decision to delegate to the Commission the power to issue sentencing guidelines cannot "disrupt" the ability of the executive branch to accomplish its "constitutionally assigned functions."

B. The Delegation Of Rulemaking Power To The Commission Does Not Disrupt the Constitutionally Assigned Functions Of The Judicial Branch

We turn now to the other side of the coin: whether the assignment of the power to issue sentencing guidelines to an independent commission located in the judicial branch undermines or threatens the constitutionally assigned mission of the *judicial* branch.

1. The central mission of the judicial branch is to exercise "the judicial Power of the United States" by adjudicating "cases" and "controversies." Article III contemplates that the federal judiciary will perform that function impartially, free from the control of the other branches. It also contemplates that the Article III courts will not be assigned tasks that are inconsistent with that mission. That is why this Court has held that an Article III court may not render advisory opinions (see *Muskrat v. United States*, 219 U.S. 346, 354 (1911)), or give judgments that are subject to executive or congressional revision. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409

reaffirming that delegations of rulemaking power to the judicial branch are constitutional.

(1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852).

But, as we discuss in Part III of this brief, this has never meant that federal *judges* may not, as individuals, participate in tasks other than the adjudication of cases. Nor has it ever meant that Congress may not create non-adjudicating institutions *within* the judicial branch that do not, themselves, exercise the judicial power of the United States. These auxiliary entities, whether consisting entirely of judges (the Judicial Conference; the Judicial Councils), a mix of judges and nonjudges (the various rules Advisory Committees), or nonjudges (the Administrative Office; the Probation Service), are validly housed in the judicial branch if their functions are necessary and proper to support the constitutionally assigned mission of that branch. See *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7 (1970). The Constitution forbids Congress to create such an entity only if it is assigned a task that “disrupt[s]” the Article III mission (*Nixon*), or if it assigns to the judicial branch functions that are “incongru[ous]” (*Siebold*) or are “more properly accomplished” by another branch (*Morrison*).

2. It is not easy to see how the delegation to the Sentencing Commission can be said to “disrupt” the constitutional mission of the judicial branch. The suggestion that the Sentencing Reform Act is unconstitutional because the service of three judges on the Commission is such a drain on resources that it will undermine the ability of the courts to do their job is too farfetched to take seriously. No less farfetched is the notion that the courts will be unable impartially to make judgments about the meaning or validity of the guidelines because three judges participated in their drafting or because the commission that issued them is within the judicial branch.¹⁸ Nor has any meaningful demonstration been made that the loca-

¹⁸ The problem of the impartiality of the judges actually serving on the Commission is adequately taken care of by the rules and practices governing recusal. See p. 43 & n.29 *infra*.

tion of the Commission in the judicial branch, and the service of three federal judges on the Commission, will somehow compromise the independence of the federal courts in adjudicating cases and controversies.

What remains is the suggestion (Pet. Br. 28) that delegating the power to make rules in the field of sentencing to the judicial branch unites policy-making power with judicial power in a manner that is dangerous to liberty. But of course Congress did not in fact "unite" these powers at all. Whatever concerns might arise if the power to issue sentencing guidelines were given to the courts as such are simply irrelevant here, since the Sentencing Commission is not a court and is not controlled by the courts or the judges.¹⁹

Congress' judgment was that a threat to liberty would arise, if at all, only from giving the power to promulgate sentencing rules to the branch that possesses the power and responsibility to prosecute: the executive branch. Congress' precautionary solution—to create an *independent* commission, consisting of independent experts including federal judges but not exclusively judicial, housed in the judicial branch but not subject to the control of the courts—represents a carefully balanced choice of means, precisely of the sort contemplated by the Necessary and Proper Clause's grant of discretion to Congress.

3. We turn now to the question whether the Commission's function—issuing sentencing guidelines to channel the sentencing discretion of the federal judges—is so "incongru[ous]" (*Siebold*), or so clearly "more properly

¹⁹ The reverse argument, that the delegation to the Commission is dangerous because its independence makes it unaccountable, would invalidate all independent agencies. It is answered by the fact that the Commission is fully accountable to Congress, which can revoke or amend any guideline either during its mandatory six-month waiting period or at any time. In addition, Congress required the Commission to abide by the notice-and-comment rulemaking requirements of the Administrative Procedure Act, thereby ensuring ample opportunity for public participation in its deliberations. 28 U.S.C. § 994(x).

accomplished" by another branch (*Morrison*), that its assignment to a judicial branch agency is unconstitutional. But the answer seems obvious: Congress' decision to enlist the judicial branch and the federal judges in the enterprise of channeling the judicial function of imposing sentence is the opposite of incongruous.

For almost 200 years, federal judges have been exercising an "unfettered" (*Dorszynski*, 418 U.S. at 437) policy-making discretion (subject to legislative maxima) to prescribe punishments. In so doing, the judges have not been engaged in mere interpretation; they have, in effect, determined what are the proper aims of sentencing, what factors make a more or less severe sentence appropriate, and how these factors should be combined in a particular case. In vivid contrast to Petitioner's suggestions (Br. 20), the judiciary has created, not merely applied, sentencing policy. Congress has now decided that this delegated judicial "lawmaking" should be accomplished by a different methodology: should be ordered to make it more evenhanded and predictable.

It defies understanding, we submit, to assert that it is incongruous or inappropriate to assign the effectuation of this changed methodology to an independent commission housed in the judicial branch that includes federal judges in its membership. The overall effect of the Act is to curb, rather than to increase, the delegated policy-making power of the judiciary with respect to sentencing. In light of this, what institutional allocation could be *more* "congruous"? Would it be "congruous" to deny the Commission the expertise of the judges, who have been originating sentencing standards (albeit on a case-by-case basis) for two centuries? To make the Commission an executive agency, with all the attendant problems of uniting the sentencing function with the executive's prosecutorial functions?

4. Petitioner's sole answer (Br. 22-27) is an abstract syllogism that supposedly shows that upholding the Act will inexorably set the Court on a dangerous slippery

slope. The sentencing guidelines, Petitioner says, are “substantive.” If the Court upholds the power of Congress to delegate the function of issuing sentencing guidelines to the judicial branch—or, in Petitioner’s habitual interchangeable usage, to the “courts” or the “judges”—it will be forced to uphold parallel delegations to that branch to issue ordinary substantive regulations in fields such as antitrust and securities, opening the door to massive expansions in the power of the judiciary. The only way to prevent this mischief is to adopt a rigid constitutional rule: the judicial branch may engage in rulemaking only with respect to *procedure*, and “procedure” must be defined narrowly to encompass only house-keeping matters that have no impact on “policy.”

The Court should reject this line of argument.

(a) This Court has so far resisted the temptation to enter into the semantic exercise of classifying rules according to an all-purpose definition of “substance” and “procedure;”²⁰ and we hope it will maintain that tradition here. As a matter of *principle*, sentencing guidelines are obviously not “substantive”: the defendant’s conduct is unlawful irrespective of the sentence. As a *practical* matter, a sentencing rule may tend to influence people’s behavior—as may many other remedial and procedural rules. But it is critical to remember that the influence of a sentencing guideline on behavior is no more or less than that of the more or less severe sentencing practices

²⁰ As this Court noted only last Term, “[e]xcept at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.” *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2124 (1988). See also *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). For that reason, *Miller v. Florida*, 107 S. Ct. 2446 (1987) (see Pet. Br. 23), is not in point. *Miller* dealt with the question of “substance” versus “procedure” only for purposes of determining whether sentencing guidelines adopted by a state legislature may be retroactively applied under the Ex Post Facto Clause. It had nothing to do with the question of what branch of government may be delegated power to issue such guidelines.

of particular courts. If sentencing guidelines are, therefore, "substantive," so were the sentences imposed at the discretion of individual judges. In neither case does it follow that the judicial branch is constitutionally barred from making sentencing decisions.²¹

We believe, therefore, that the entire definitional issue is a red herring. The Constitution does not say, and this Court has never held, that separation-of-powers principles limit the rulemaking power of the courts to "procedural" matters.²² Still less is it the law that the meaning of the substance-procedure dichotomy is that Congress may not delegate to the courts the power to issue rules in fields involving issues of federal policy that affect substantive rights. Judicial rulemaking under the various enabling acts has frequently involved important policy choices and has important effects on the substantive rights of litigants. Yet the Court has repeatedly promulgated such rules despite dissents arguing that "many [Rules] determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation

²¹ The sentencing guidelines, unlike the rules issued by the FTC and SEC, do not bind the general public (no one can go to jail for disobeying a sentencing guideline); they are *court* rules regulating the conduct of judges. Probably the most accurate definitional approach is to characterize the sentencing guidelines as *remedial*, rather than either substantive or procedural.

²² The Rules Enabling Act provides that the rules issued thereunder "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. But the Court has never said that this proviso is compelled by separation-of-powers principles. Instead, the Court's "original and enduring view" has been that "the Act's procedure/substance dichotomy was intended to allocate lawmaking power between the federal government and the states." Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1028 (1982). See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("the Enabling Act * * * say[s], roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law"). Consequently, the constitutional significance of the line between procedure and substance concerns issues of *federalism*, not separation of powers.

* * *." 374 U.S. 865-866 (1963) (statement of Black and Douglas, JJ.). And in *Sibbach* the Court—in upholding a rule that was recognized as having a major impact on the right to privacy—characterized the courts' rulemaking power under the Enabling Act in broad terms, encompassing all rules that regulate "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress." 312 U.S. at 14.

On the one occasion when this Court has addressed the question of Congress' power in this connection, the Court ruled explicitly that Congress possesses a wide constitutional discretion to classify rules for purposes of defining the proper scope of the federal courts' delegated rulemaking power. "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). This ruling would seem determinative here.²³

(b) In light of *Sibbach* and *Hanna*—and in light of the overriding separation-of-powers standards announced in *Siebold* and *Morrison*—it seems clear that the important question is not whether sentencing guidelines regu-

²³ Indeed, *Hanna* is a *fortiori* for the conclusion that the Sentencing Reform Act is constitutional. In *Hanna*, it was the constitutional power of Congress to enact the relevant rule that was itself in question (in view of the states' constitutional prerogative to make their own substantive laws). In the case of the Sentencing Commission, no doubt can be raised about Congress' own constitutional power to enact the sentencing guidelines; the sole issue is the scope of Congress' constitutional discretion in classifying the rulemaking power for purposes of determining whether it may be delegated to the judicial branch. It would be perverse to conclude that Congress' discretion is smaller in the latter situation than it was in *Hanna*.

late "substance" or "procedure,"²⁴ but whether the *subject* of sentencing is incongruous (*Siebold*) or inappropriate (*Morrison*) for rulemaking by an independent agency within the judicial branch. As we have already demonstrated (pp. 34-35, *supra*), under this test, no serious doubt can attach to the appropriateness of allowing an independent mixed commission, assigned to the judicial branch in order to safeguard its independence, to formulate sentencing guidelines to guide the sentencing discretion of the federal district courts. The history and theory of sentencing during the past two centuries amply justify Congress' careful judgment that "sentencing should remain primarily a judicial function." S. Rep. 159. Since policy making in the *field* of sentencing has been and remains appropriate for the judicial branch; and since the *methodology* of rulemaking is not forbidden to an independent commission within the judicial branch, no serious issue of "incongruity" arises.

(c) The Court does not have to pass on the purely hypothetical question whether it would be proper to assign to the courts, or to an independent agency within the judicial branch, the task of issuing purely substantive regulations governing matters such as securities fraud. It seems obvious that such a scheme would, on historical grounds alone, be problematic in ways that are irrelevant to the sentencing guidelines. The judiciary has never exercised, and has no expertise in, rulemaking that *directly* regulates the primary conduct of the public; at some point a substantial concern that the powers traditionally exercised by the judicial branch had been inappropriately expanded might very well come into play.

But it would be most unwise to anticipate those concerns by fashioning an abstract, procrustean rule against

²⁴ It would surely be of questionable appropriateness for the Supreme Court to be assigned the task of issuing *procedural* rules to govern proceedings before executive branch agencies; and it would certainly be inappropriate for an executive branch agency to issue *substantive* rules governing the grounds for removal from the bar of the Supreme Court.

rulemaking within the judicial branch that would needlessly tie Congress' hands and that would invalidate a sensible scheme such as the Sentencing Reform Act. The Court today needs to decide only a specific question: whether it is "incongruous" or "inappropriate" to create an independent agency, housed in the judicial branch, to issue rules to channel the discretion of the judges in the field of sentencing, which has for more than 100 years been largely confided to the policy-making discretion of the judiciary. We submit that the only possible answer to that question is a simple, definitive "No."

III. THE COMMISSION'S MIXED COMPOSITION DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES

A. The Constitution Does Not Forbid Judges, Acting As Individuals, To Undertake Extra-Judicial Activities

Petitioner's assertion that Article III judges may not serve on the Commission casually sweeps into the dustbin 200 years of consistent constitutional practice that has seen numerous Justices and judges serve, in their individual capacities, in a wide variety of non-adjudicative roles. This Court has never held or even suggested that there exist *constitutional* rules governing the question whether federal judges may take on such nonjudicial duties in their individual capacities. Even if such rules are to be created, they should not bar service on a Commission charged with the task of channeling the sentencing discretion of federal judges.

1. The Constitution does not speak to the question whether individual federal judges may undertake non-judicial governmental duties. The Constitutional Convention framed the Incompatibility Clause (Art. I, § 6, cl. 2) to prohibit members of Congress from serving as officers of the United States, but rejected proposals that would have barred judges from holding other office. See Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers*, 49 Conn. B.J. 391, 396-401 (1975). The natural inference—and the one on which Justices

and judges have consistently acted since 1789—is that the Constitution does not bar federal judges from accepting official duties outside their adjudicative capacities. See *In re President's Commission On Organized Crime* ("Scarfo"), 783 F.2d 370, 377 (3d Cir. 1986) (collecting examples).

The long tradition of service by federal judges on various nonjudicial bodies does not, of course, mean that it is always prudent or proper for a judge to engage in extra-judicial tasks. But the range and variety of non-judicial duties accepted by Justices and judges (some of them participants in the framing of the Constitution) attests to a common understanding that the decision whether to do so is a matter for the discretion of the individual judge, the canons of judicial ethics, and the rules governing recusals, rather than for constitutional norms. If it was valid for Marshall to serve as Secretary of State and Jay as Ambassador to Great Britain, for Justice Jackson to prosecute at Nuremberg and Chief Justice Warren to investigate the Kennedy assassination, it would surely be perverse to conclude that three circuit judges may not participate in the work of the Sentencing Commission.

2. Congress, too, has repeatedly acted on the understanding that it may constitutionally assign significant non-adjudicative tasks to judges.²⁵ Congress has created numerous bodies, such as the Judicial Conference and the Judicial Councils, that are composed entirely or in part of designated judges. See 28 U.S.C. §§ 331-332; see generally Meador, *The Federal Judiciary and Its Future*

²⁵ Early in our history, Congress assigned the Chief Justice to serve *ex officio* as a member of the Sinking Fund Commission, which was entrusted with the task of repurchasing evidences of the national war debt. Act of August 12, 1790, ch. 47, 1 Stat. 186. Although the Commission was "clearly expected by Congress to exercise administrative discretion" in making purchases of the debt pursuant to its own regulations, no objection was raised in the debate "to this 'further use' of the Chief Justice." Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 141-142.

Administration, 65 Va. L. Rev. 1031 (1979). Far from suggesting that the separation of powers is incompatible with Congress' settled understanding that it may assign a broad range of non-adjudicative duties to Article III judges, this Court in *Chandler* saw "no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies," the authority to administer "the business of the courts within [each] circuit." 398 U.S. at 86 n.7.

3. Petitioner persistently obscures this issue by collapsing the settled distinction between what Congress may ask *courts* to do and what it may ask *judges*, acting individually, to do. Thus Petitioner quotes (Br. 18) this Court's observation that, "[a]s a general rule * * * 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'" *Morrison*, 108 S. Ct. at 2612 (quoting *Buckley v. Valeo*, 424 U.S. at 123). But this Court has never applied that "general rule" to service by judges *outside* the "office [they hold] under Art. III."²⁶ In fact, the decisions on which the rule is based—*United States v. Ferreira* and *Hayburn's Case*—demonstrate beyond a doubt that the rule governs only the question of what duties Congress may assign to an Article III court acting as a court.²⁷

²⁶ The "Special Division" whose non-adjudicative duties this Court upheld in *Morrison* is a "special court" created to appoint independent counsels. 108 S. Ct. at 2603. For that reason, Petitioner's extensive discussion (Br. 18-20) of the Court's Article III analysis of the Special Division's powers is inapposite.

²⁷ As the Court explained in *Ferreira*, the principle of *Hayburn's Case* is that a "duty imposed, where the decision was subject to the revision of a Secretary and of Congress, *could not be exercised by the court as a judicial power.*" 54 U.S. at 50 (emphasis added). Conversely, the Court indicated that if the statute in *Hayburn's Case* had "conferr[ed] the power on the judges personally as commissioners," the judges "might constitutionally exercise it, and the Secretary constitutionally revise their decisions." *Ibid.*

The distinction drawn in *Ferreira* is not an empty technicality; rather, it is fully consistent with the rationale for the limitation

4. Petitioner does not—and could not—show that service by three judges on the Sentencing Commission threatens judicial independence or allows judicial “encroaching into areas reserved for the other branches.” *Morrison*, 108 S. Ct. at 2612. Instead, he resorts yet again to the slippery slope. Br. 45-46. What Petitioner cannot explain away, however, is that for 200 years we have managed, without inventing constitutional rules to govern the matter, to avoid parade-of-horribles statutes such as one requiring the Director of the FBI to be a sitting judge. There is no reason to think that Congress would enact a statute that assigned judges to such an inappropriate role, let alone that judges would accept it.²⁸ What history demonstrates is that rules relating to recusal and canons of judicial ethics are quite sufficient to regulate these matters.²⁹

on Congress’ power to assign nonjudicial duties to Article III courts. Revision of the nonjudicial action of an individual judge does not threaten “the independence of the Judicial Branch” (*Morrison*, 108 S. Ct. at 2612) because the judge is not exercising the judicial power conferred by Article III; and service by an individual judge in a nonjudicial capacity does not enable “the judiciary” to “encroach[] into areas reserved for the other branches” (*ibid.*) because the supremacy of the judiciary in its own sphere does *not* extend to the judge’s nonjudicial acts, which may be restrained and limited by the other branches.

²⁸ In the case of the Sentencing Commission, Congress determined that it was “appropriate” for judges to serve without resigning their judicial office because they “will be engaged in activities closely related to traditional judicial activities,” and that this was “necessary” to enable “highly qualified [judicial] candidates” to serve without “the substantial burden” of resigning. S. Rep. 163.

²⁹ Judge-commissioners can recuse themselves in appropriate cases in order to avoid any appearance of bias without impairing the work of the courts. See 28 U.S.C. § 455; *Scarfo*, 783 F.2d at 381. See also *Morrison*, 108 S. Ct. at 2615 (the statute requiring recusal of members of the Special Division in cases involving any independent counsel “avoid[s] any taint of the independence of the judiciary”).

The Eleventh Circuit’s questionable ruling that federal judges may not constitutionally serve on the Crime Commission, *In re Application of the President’s Comm’n on Organized Crime*, 763

B. Non-Judges May Serve On The Commission

In recognition of the historic role of the executive in the shaping of sentencing policy, and to create a wide range of expertise on the Commission, Congress sensibly decided to create a mixed Commission, with non-judges as well as judges as members. Petitioner argues (Br. 14) that the service of non-judges with Article III judges on a commission in the judicial branch constitutes a forbidden "‘sharing’ of judicial power with persons who are not Article III judges." Petitioner cites this Court's statement that "the 'judicial Power of the United States' vested in the federal courts" may not be "shared with the Executive Branch." *United States v. Nixon*, 418 U.S. 683, 704 (1974). But this statement has no application to the Commission, which is not a "federal court" and which does not exercise "the judicial Power of the United States."³⁰

Petitioner's approach would forbid all inter-branch cooperation in the name of rigid rules against "sharing" of governmental power. As this Court has repeatedly emphasized, that is not what the separation of powers means: "interdependence" and "reciprocity" among the branches are often necessary to "integrate the dispersed powers into a workable government." *Morrison*, 108 S. Ct. at 2620 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

F.2d 1191 (11th Cir. 1985), overlooks recusal, and in any event has no application to the Sentencing Commission, which is not charged with assisting the executive branch in investigation or enforcement of the criminal laws.

³⁰ Petitioner evidently assumes that because the Commission is "in" the judicial branch it must be exercising the "judicial power." This assumption, which would call into question the constitutionality of numerous non-adjudicative bodies in the judicial branch, such as the Administrative Office and the Probation Service, would actually *increase* threats to the independence of the judicial branch by making it dependent on executive branch agencies for necessary administrative assistance. See Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. Pol. 599, 604-609 (1970).

IV. THE PRESIDENT'S REMOVAL POWER IS CONSISTENT WITH THE SEPARATION OF POWERS

Petitioner argues that the President's power to remove commissioners "only for neglect of duty or malfeasance in office or for other good cause shown" (28 U.S.C. § 991(a)) violates the separation of powers.

1. Petitioner acknowledges (Br. 32) that the ultimate issue in evaluating the constitutionality of the President's removal power is "the extent to which it prevents the [judicial] Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. But, having paid lip service to the *Nixon* test, Petitioner makes no effort to show that the Sentencing Reform Act runs afoul of it. The President's power to remove commissioners for cause in no way threatens the life tenure or salary of judges as judges.³¹ Nor does it in any way undermine the performance of the "constitutionally assigned" function of the federal courts to adjudicate cases within the federal judicial power. Thus, the Act does not breach the controlling constitutional standard.

2. Nevertheless, relying on this Court's decision in *Bowsher* that Congress may not retain the power to remove an official performing "executive" functions, Petitioner asserts that the President may not be given the power to remove Commission members performing "judicial" functions. And he attempts to repair the obvious defect in the analogy—the fact that Commission

³¹ Petitioner complains (Br. 32-33) that the President's power to decide whether or not to reappoint members of the Commission (and to designate its Chairman) will enable the President to control the commissioners. But the notion underlying this objection—that the President must be stripped of all possible ways to influence judges—is wrong. For example, the President has the power to "promote" judges to a higher court; and he has the power to ask judges to leave the judicial branch for high positions in government. If Presidents can refrain from abusing these means of "tempting" judges, and if judges can withstand these blandishments, it seems clear that any temptation that may attach to possible reappointment to, or chairmanship of, the Commission is not constitutionally problematic.

members do not perform a "judicial" function—by broadening *Bowsher* into a flat *per se* rule against removals of officials of one branch by a member of another branch.

Having rejected a parallel *per se* rule against interbranch appointments in *Morrison*, see 108 S. Ct. at 2609-2611, the Court should not create such a constitutional rule for removals. Article III grants life tenure to federal judges, but does not rule out giving the President limited removal powers in the case of malfeasance on the part of other officers of the United States who serve in the judicial branch. Certainly no *per se* rule against interbranch removals has existed in the past, as is attested by the unquestioned practice of presidential removal of judges who serve on "legislative courts" created by Congress under Article I. In *McAllister v. United States*, 141 U.S. 174, 185 (1891), this Court, after reviewing the variety of tenure provisions Congress had enacted in establishing courts in the territories, flatly stated: "As the courts of the Territories were not courts the judges of which were entitled, by virtue of the Constitution, to hold their offices during good behavior, it was competent for Congress to prescribe the tenure of good behavior * * * or to prescribe * * * the tenure of four years and no longer, or four years unless sooner removed, or four years unless sooner removed by the President * * *." ³²

3. Nor did *Bowsher* create such a *per se* rule. This Court carefully limited its holding in *Bowsher* to cases where the power of removal makes the officer "sub-

³² Similarly, the judges of the United States Tax Court, which is "established, under article I of the Constitution of the United States, [as] a court of record," 26 U.S.C. § 7441, are appointed by the President and may be removed by him "for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." 26 U.S.C. § 7443(f). See also *Palmore v. United States*, 411 U.S. 389, 409 (1973) (discussing provisions for removal of Article I judges of the District of Columbia courts by a commission a majority of whose members are appointed by the President).

servient to Congress.” 106 S. Ct. at 3189.³³ It then went on to examine in detail the question whether the *particular* removal provision in *Bowsher* in fact created “subservience.” If the mere existence of a limited removal provision were enough to establish “subservience” to the removing body, this Court’s elaborate exploration of the background of the provision for removal of the Comptroller General (106 S. Ct. at 3189-3191) would have been pointless. That it was in fact decisive is plain from the Court’s opinion. The Court made it clear that the kind of “control” that is “constitutionally impermissible” exists where “Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress.” *Id.* at 3189. On the basis of a detailed study of the legislative history of the removal provision and the history of Congress’ relationship to the Comptroller General, the Court concluded—although the statute was in form a limited removal provision—that the removal power actually conferred was “very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will.” *Id.* at 3190.

Congress gave the President no such broad authority over the Sentencing Commission. In fact Congress emphasized that it *did not* wish to give “significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases.” H.R. Rep. No. 1017, *supra*, at 95. That is why Congress made the Commission “independent” and placed it in the judicial branch, thus requiring it to perform its duties “without executive leave.” *Humphrey’s Executor*, 295 U.S. at 628. In making its decision to create an independent Commission, Congress obviously

³³ We note, too, that *Bowsher* related entirely to the special problem of aggrandizement by Congress of its role in the removal process, in the teeth of the “Decision of 1789” rejecting “a congressional role in the removal of Executive Branch officers.” *Bowsher*, 106 S. Ct. at 3187.

acted on the understanding, settled since *Humphrey's Executor*, that a "good cause" removal provision is designed to safeguard an officer's independence from executive branch control, not his accountability or subservience to the President.³⁴ See *Morrison*, 108 S. Ct. at 2619 n.30 (noting that Congress frequently employs "a 'good cause' removal standard" where it determines that "a degree of independence from the Executive * * * is necessary to the proper functioning of the agency or official"); *id.* at 2627 (Scalia, J., dissenting) ("good cause" removal provisions are "a means of eliminating presidential control"). Given this tradition and these careful statutory provisions, it is nonsense to suppose that Congress intended at the same time to make the Commission "subservient" to the President. *Bowsher*, 106 S. Ct. at 3189.

5. As a matter of administration, it is sensible and appropriate that the President should exercise some supervision over possible dishonesty or neglect of duty by

³⁴ In *Humphrey's Executor*, the Court interpreted the statute establishing the FTC to mean that that agency was to perform "[i]ts duties * * * without executive leave and * * * free from executive control," 295 U.S. at 628, and held that the President's power to remove commissioners "for inefficiency, neglect of duty, or malfeasance in office" did not permit removal because of a disagreement over policies. *Id.* at 625-626. By contrast, in *Bowsher* this Court found that a more expansive reading of the Comptroller General's "good cause" removal provision was warranted because that particular provision (adopted some fourteen years prior to *Humphrey's Executor*) was intended to give "[t]he Congress of the United States * * * absolute control of the man's destiny in office." *Bowsher*, 106 S. Ct. at 3190 (quoting 61 Cong. Rec. 987 (1921)). The Sentencing Commission, however, was created some 50 years after *Humphrey's Executor* established that "good cause" removal provisions ensure the freedom of independent agencies from presidential control, and it was plainly modeled on agencies that are "independent of the Executive in their day-to-day operations." *Buckley v. Valeo*, 424 U.S. at 133. In fact, the *Bowsher* Court specifically distinguished the Comptroller General's removal provision from the typical "good cause" removal provision in statutes, such as 28 U.S.C. § 991(a), establishing independent agencies. See 106 S. Ct. at 3188 n.4.

commissioners—so long as this involves no presidential control over the Commission's policy discretion. Congress' decision to give the President—rather than, say, the Judicial Conference—the narrow power to remove commissioners for “good cause shown” is no more anomalous or problematic than the President's undoubted constitutional power faithfully to execute the laws by instituting criminal prosecutions against persons who are serving in the other branches (including judges and legislators). It is a typical instance of a needed housekeeping decision that Congress may make pursuant to its authority to enact necessary and proper legislation.

V. IF THIS COURT DETERMINES THAT THE COMMISSION MAY NOT BE HOUSED IN THE JUDICIAL BRANCH FOR SEPARATION-OF-POWERS PURPOSES, THE STATUTORY PHRASE “IN THE JUDICIAL BRANCH” MAY BE CONSTRUED AS LIMITED TO HOUSEKEEPING AND ADMINISTRATIVE MATTERS

If this Court concludes that it is constitutionally problematic to treat the Commission as located in the judicial branch for separation-of-powers purposes, the phrase “in the judicial branch” (28 U.S.C. § 991(a)) should be read simply as an exercise of Congress' undoubted power to assign the Commission to the judicial branch for budgetary, housekeeping, and statutory purposes. On that interpretation, the Commission—for separation-of-powers purposes—would simply be an “independent commission” like any other independent agency. This reading of the statute—which requires no “severance”—would leave intact Congress' central purpose that the Commission should be wholly *independent* from control by the political branches.

On this view, the constitutional status of the Commission is unproblematic. Independent agencies routinely issue even purely “substantive” rules. And the service of federal judges on this agency is amply justified both historically and functionally by the central role of the judiciary in matters of sentencing.

CONCLUSION

At the end of the day, we submit that the case against the validity of the Sentencing Reform Act is remarkably thin—an example of the “wish is father to the thought” school of constitutional interpretation. Neither constitutional text, nor constitutional practice, nor this Court’s precedents, put this statute under a cloud. Rather, the Court can freely accede to Congress’ determined wish that the guideline system go forward.³⁵

For these reasons, the judgment of the district court should be affirmed.

³⁵ As this brief was in press, the Ninth Circuit, in *Gubiensio-Ortiz v. Kanahale*, Nos. 88-5848 & 88-5109 (Aug. 23, 1988), held 2-1 that the Sentencing Reform Act is unconstitutional, stating: “We can prevent undue entanglement by the judiciary in the operation of the political branches only by adopting a clear-cut, prophylactic rule: Congress may not, under our system of separated powers, require judges to serve on bodies that make political decisions.” Slip op. 50 (footnote omitted). Yet for 200 years we have left this issue to be settled, according to the felt necessities of the times, by the good sense and self-discipline of the American judiciary, without the need for *constitutional* intervention. We do not understand how the Constitution can be read to authorize the federal courts to exercise the awesome power to invalidate a major congressional enactment on the basis of a self-generated prophylactic rule that is not supported by the text or structure of the Constitution or by our historic practices.

Nor do we understand why any such prophylactic rule should be generated for *this* case, involving the delegation of rulemaking power in a field where for 200 years the federal courts have already been exercising authority to “make political decisions.” See pp. 36-37, *supra*. If Congress may constitutionally delegate to individual judges “unfettered” lawmaking authority to prescribe the punishment for crime, subject only to statutory maxima, there is no substantial reason why Congress may not now circumscribe that delegation by authorizing an independent commission including judges to promulgate sentencing guidelines that are also subject to statutory maxima, as well as to newly-prescribed congressional standards.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

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Petitioner,

v.

JOHN M. MISTRETTA,

Respondent.

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UNITED STATES OF AMERICA,

Respondent.

**On Writs Of Certiorari Before Judgment
To The United States Court Of Appeals
For The Eighth Circuit**

**BRIEF OF AMICUS CURIAE, NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
IN SUPPORT OF RESPONDENT-PETITIONER
MISTRETTA**

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QUESTIONS PRESENTED¹

1. Did Congress violate principles of separation of powers when it assigned to the Sentencing Commission, a body within the judicial branch, three of whose seven voting members must be Article III judges, the power to issue substantive, binding sentencing guidelines for federal crimes?

2. Did Congress make an excessive delegation of legislative authority to the Sentencing Commission to issue sentencing guidelines, where Congress failed to make basic policy choices and failed to establish intelligible principles to constrain the Commission regarding fundamental areas of the guidelines?

3. When Congress enacted a new determinate sentencing system in the Sentencing Reform Act, would it have intended to abolish parole and substantially restructure good behavior adjustments if the sentencing guidelines, which form the core of the new system, were found unconstitutional and hence unenforceable?

¹ The phrasing of the questions presented is taken from the brief of Respondent-Petitioner Mistretta.

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**BRIEF OF AMICUS CURIAE, NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
IN SUPPORT OF RESPONDENT-PETITIONER
MISTRETTA**

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation founded in 1958. NACDL has an affiliated membership of

more than 10,000 lawyers, law professors, and interested legal professionals from every state, most of whom are engaged actively in defending criminal prosecutions and protecting individual rights. NACDL is the only national bar organization on behalf of public and private defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

NACDL was founded to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers and criminal justice professionals. NACDL's members have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the fair and proper administration of criminal justice.

NACDL's purpose in appearing as *amicus curiae* is to assist the Court in evaluating the constitutionality of both the sentencing guidelines and its derivative legislation. NACDL has appeared as *amicus curiae* in more than twenty district court cases focusing on the constitutionality of the Sentencing Commission and the sentencing guidelines. No criminal justice issue in recent history has had such a potential impact on the criminal justice system.

Consent has been granted by both parties to the filing of this *amicus* brief.

SUMMARY OF THE ARGUMENT

The sentencing provisions of the Comprehensive Crime Control Act of 1984,² known as the Sentencing Reform

² Pub.L. 98-473, Title II, c.II, Oct. 12, 1984, 98 Stat. 2031, as amended by Pub.L. 99-217, §§2, 4, Dec. 26, 1985, 99 Stat. 1728, Pub.L. 99-646, §35, Nov. 10, 1986, 100 Stat. 3599. See 18 U.S.C. §3551 note (Supp. 1987), as amended by the Sentencing Act of 1987, Pub.L. 100-187 (Dec. 7, 1987).

Act of 1984 ("Sentencing Reform Act"), established an agency within the judicial branch called the United States Sentencing Commission ("Commission"). 28 U.S.C. §991.³ The Sentencing Reform Act directs the Commission to promulgate determinate sentencing guidelines for every federal offense and to insure that the guidelines promote "certainty and fairness in the purposes of sentencing."⁴ The introduction of guideline sentencing to the federal criminal justice system drastically alters the traditional functions of the judiciary, defense counsel, the United States Probation Office, and prosecutors.

Congress delegated to the Commission the power to set sentences for all categories of offenders who commit crimes. The delegation shifts to the Commission the traditional role of the courts to determine the sentence to be imposed upon a particular defendant. The Commission has been given both legislative and rulemaking power to establish and amend regulations (the guidelines).⁵ The Commission is empowered to issue policy statements which must be accorded substantial deference by the sentencing judge.⁶ The Commission has adjudicatory power over petitions to modify the guidelines.⁷ The Commission also

³ The Commission is an independent agency in the "judicial branch." 28 U.S.C. §991(a). However, the Department of Justice has taken the position in cases involving the guidelines that the Commission exercises executive functions and is not an agency of the judicial branch, but is in the executive branch. See United States Department of Justice, Office of Legal Counsel, Memorandum for Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission (January 8, 1987); *United States v. Perez*, 685 F.Supp. 990, (W.D.Tex. 1988).

⁴ 28 U.S.C. §§991(b)(1)(B), 994(a)-(n)(Supp. III 1985).

⁵ 28 U.S.C. §994(a)(1)(b),(o),(p) S.Rep. No. 98-225 at 168 98th Cong., 1st Session September 14, 1983, hereinafter cited as "S.Rep." and referred to as the Report.

⁶ 28 U.S.C. §994(a)(2).

⁷ 28 U.S.C. §994(s).

exercises more traditional executive functions: conducting training programs; recommending legislation; conferring with the Bureau of Prisons and other agencies; and collecting, generating and distributing information.⁸

The Commission is a permanent body composed of seven voting members, at least three of whom must be federal judges, appointed for six year terms by the President, with the advice and consent of the Senate. The President can remove commissioners for neglect of duty, malfeasance in office, or other good cause.⁹ The federal judges serving on the commission do not resign from the bench, even though all Commissioners serve full-time for the first six years and the chair serves full-time thereafter.¹⁰

The delegation to the Commission of the traditional judicial sentencing role to be carried out by legislative rule-making and executive enforcement violates the constitutional principle of separation of powers. Congress has no authority to give the power to promulgate sentencing legislation to an agency which includes federal judges among its membership. The required presence of judges in their judicial roles places the Article III judges in the constitutionally awkward position of engaging in binding rulemaking and statutory administration. The constitutional independence of Article III judges is compromised, because the President's removal power gives the executive branch abundant unfettered control over the Commission.

The delegation to the Commission of the authority to promulgate sentencing guidelines is excessive where the Commission's role, responsibilities, and power are unbridled and unchecked. Congress cannot delegate this core legislative function; even if it could do so, the method of delegation to the Commission is so lacking in intelligible

⁸ 28 U.S.C. §994(o)-(s), (w), §995(a)(12)-(20).

⁹ 28 U.S.C. §991(a).

¹⁰ 28 U.S.C. §992(c).

rules and principles as to be standardless and unconstitutional.

Upon a finding that the Sentencing Reform Act is unconstitutional with respect to the sentencing guidelines, the Court should declare that the related provisions of the Act are not severable from the unconstitutional portion. The Act itself must be read as a whole, with the guidelines being the central focus of a comprehensive revision of the sentencing code. The Act, without the guidelines, promotes the very unfairness and disparity which was to be eliminated by the sentencing guidelines. Consequently, Congress would not have enacted the related provisions without the guidelines themselves.

ARGUMENT

I. The United States Sentencing Commission Violates The Separation Of Powers Doctrine Because Of Its Required Membership Of Article III Judges.

A. The Judicial Role Envisioned By The Sentencing Reform Act Impairs The Independent Functioning Of The Judiciary.

The strength and endurance of our federal government results from the foresight of the framers of our Constitution, who created a secure separation of power among and between the three branches of government. The Constitution assigned distinct powers and responsibilities to the three coordinate branches, devising a system of checks and balances which hinders excessive control by any one of the branches. The aggregation of power in one branch, or the exercise of non-branch authority by another, creates an imbalance which fosters constitutional crisis. The Sentencing Reform Act has just that effect. In order to bring equilibrium back to our governmental system, the Court must declare that the Sentencing Reform Act and the sentencing guidelines are unconstitutional.

The Sentencing Commission is legislatively designated as "an independent commission in the judicial branch." 28 U.S.C. §991(a).¹¹ Notwithstanding this congressional moniker, the Commission does not act like a creature of the judicial branch. Nor can the Commission be a judicial agency if it is to accomplish its legislative purpose. As the agency directed to make and execute the law, the Commission performs legislative, executive and administrative duties. *Buckley v. Valeo*, 414 U.S. 1, 134-135 (1976); *Humphrey's Executor v. United States*, 295 U.S. 602, 623 (1935). This puts the Commission on a collision course with the Constitution, because the judiciary is being asked to both write and execute the very laws which it is required to apply. This collaborative effort between the judicial and the executive and legislative branches compromises the very independence and impartiality of the federal bench, characteristics which are essential to our system of justice.¹²

To analyze the separation of powers problem, it is essential to recognize what the Commission does. Its purpose is to *fix* the punishment for the entire spectrum of the federal criminal code. The Commission formulates policy decisions relevant to sentencing, and yet the Act mandates the close collaboration of the judicial and executive branches. This "judicial" Commission acts not on the basis of actual cases or controversies, but as a legislative and policy setting government agency.¹³ *Massachusetts v. Mel-*

¹¹ "Placement of the Commission in the judicial branch is based upon the Committee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." Report at 159, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3342.

¹² The separation of powers is the definitive characteristic of American constitutional government. G. Wood, *The Creation of the American Republic, 1776-1787*, at 51 (1969); *United States v. Bogle*, ___ F.Supp. ___, 1988 Westlaw 60560 (S.D.Fla. June 15, 1988) (en banc).

¹³ Because the Sentencing Reform requires that three of the seven

lon, 262 U.S. 447, 482 (1923). See also *Muskrat v. United States*, 219 U.S. 346, 355 (1911).

The Commission's close interaction with the judiciary is not limited to the judges who serve as commissioners. Individual judges are made subservient to the Commission, with the requirement that all judges submit written reports to the Commission on every sentence imposed. 28 U.S.C. §994(w). The Judicial Conference is required to perform a number of tasks essential to the operation of the Commission, including recommending a list of six judges to serve on the Commission, 28 U.S.C. §991(a), and submitting an annual report on the operation of the guidelines. 28 U.S.C. §994(o).

The doctrine of separation of powers is one of the most important checks on governmental power in the Constitution. The premise of the doctrine was set out by the Court in *Bowsher v. Synar*, 478 U.S. 714, ___, 106 S.Ct. 3181, 3186 (1986):

The Constitution sought to divide the delegation powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

Structuring government into three separate branches recognizes that the necessary powers wielded by each branch is different, and that those powers should be carefully defined:

voting members of the Commission "shall be federal judges," 28 U.S.C. §991(a), absent membership by the judiciary, the Commission could not function. *United States v. Bogle*, ___ F.Supp. ___, 1988 Westlaw 60560 (S.D.Fla. June 15, 1988) (en banc).

[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist No. 47, at 301 (J. Madison).

The three branches were never intended to be sealed off from one another without any possibility of interaction. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976). While the Constitution permits some interdependence among the branches, *Missouri Kan. & Tenn. Ry. Co. v. May*, 194 U.S. 267, 270 (1904) (Justice Holmes stated, "some play must be allowed for the joints of the machine . . ."), that cooperation cannot be so great as to threaten the independence of the branches.

The aggregation of legislative, executive, and judicial power in the same hands is as threatening to notions of liberty today as it was when Madison recognized the problem:

Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.

The Federalist No. 47, at 303 (J. Madison) (emphasis in original). Hamilton further explored that danger in *The Federalist* No. 81, at 483 (A. Hamilton):

From a body which has had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in

the character of legislators would be disposed to repair the branch in the character of judges.

These sound principles have led to the evolution of a "functional test" to determine whether the imposition of powers traditionally associated with one branch on officials of another branch interferes with constitutionally assigned functions. *Nixon v. Administrator of General Services*, 433 U.S. at 443. In the case of the judiciary, the function of judges is to decide cases and controversies. Art. III, §2, U.S. Const.;¹⁴ *United States v. Serpa*, ___ F.Supp. ___, 1988 Westlaw 71484 (D.Neb. July 12, 1988) (en banc). This Court so stated in *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968):

[T]he judicial power of federal courts is constitutionally restricted to "cases" and "controversies". . . . Embodied in the words "cases" and "controversies" are two complimentary, but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary

¹⁴ "Consistent with Article III the judiciary may also exercise certain administrative powers incidental to the smooth running of the courts, such as promulgating rules of court procedure, assigning judges to hear cases in other districts or circuits and disciplining judges." *United States v. Swapp*, ___ F.Supp. ___, n.5 (D.Utah July 8, 1988) (en banc). See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 111 (1970) (Harlan, J. concurring) (The judiciary may exercise such powers as are "reasonably ancillary to the primary, dispute-deciding function" of the courts). See also *In re: Certain Complaints Under Investigation*, 783 F.2d 1488, 1503-1506 (11th Cir.), cert. denied, 477 U.S. 904 (1986). Nothing in Article III allows judges to make substantive rules. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 12-14 (1941). Judges are not permitted to make rules on matters external to their traditional judicial function. See Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363, 1378 (1987).

in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

The meaning of this doctrine as it applies to judges is clear:

[The Court has held that] executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution.

Morrison v. Olson, 108 S.Ct. 2597, — (1988).

The Eleventh Circuit visited the "functional test" for separation of powers application in a challenge to the constitutionality of the President's Commission on Organized Crime. In *Application of the President's Commission on Organized Crime (Subpoena of Scaduto)*, 763 F.2d 1191 (11th Cir. 1985), the court concluded that "[u]nder the functional test propounded in the *Nixon* cases, that conferral of such powers on federal judges violates the separation of powers." *Scaduto* held that the inclusion of Article III judges on the President's Commission on Organized Crime ran afoul of the separation of powers doctrine because it threatened the impartiality requirements of "the federal judicial office." The decision rested upon the view that the separation of powers "has been construed to prohibit . . . those arrogations of power to one branch of Government which 'disrupt[] the proper balance between the coordinate branches,' *Nixon v. Administrator of General Services*, 433 U.S. at 443, or 'prevent [one of the branches] from accomplishing its constitutionally assigned functions,' *Id.* (Citing *United States v. Nixon*, 418 U.S. 711-12, 94 S.Ct. at 3109-10)". 763 F.2d at 1195.¹⁵

¹⁵ The Third Circuit evinced similar concerns for the impartiality of the judicial branch in *In Matter of President's Commission on Organized Crime (Subpoena of Scarfo)*, 783 F.2d 370 (3d Cir. 1986), but disagreed

These principles, when focused on the constitutionality of the Sentencing Commission, fall on the side of its unconstitutionality. The multi-functioned Commission compromises the independence and integrity of the judiciary, calls into question the propriety of a congressional grant of rulemaking authority to an independent "judicial" agency, and increases the power of the executive branch. The unprecedented power wielded by the Commission is precisely why its enabling legislation is unconstitutional. The Commission, as it is constituted and operates, strikes at the very concept of an impartial federal bench. This fact is enough to cause the citizenry to question the institutional fairness of the criminal justice system, a consequence which could wreak havoc upon its operation.

Impartiality is one of the central constitutionally ordained requirements of federal judicial office. *Commodities Futures Trading Comm. v. Schor*, 478 U.S. 833, — (1986); *United States v. Will*, 449 U.S. 200 (1980); *Scaduto*, 763 F.2d at 1197. Where judges have written the rules, the loss of neutrality must be presumed. The fears that concerned the framers of the Constitution are made real by the Commission and its work. Judges, fulfilling the mandate of Congress, write the guidelines and revise them, promulgate them as law, prepare interpretative materials, and teach their use. Then, the judge-commissioners and their colleagues apply the guidelines and sentence based on what the judiciary has previously written. The Commission's work necessarily involves the judges in formulating and recommending legislation for changes in sentencing laws as well as all statutes relating to any part of the criminal adjudication and corrections system. Each of these duties requires participation in matters which will

with the *Scaduto* conclusion, relying in part on the distinction between the powers conferred upon a "court" and upon a "judge." *Id.* at 376. *Scarfo* held the President's Commission to be nonjudicial, and observed that the services of the judges were voluntary and could be severed.

come before the judges, either as trial judges or on appeal.¹⁶

In the court below and in other lower tribunals, the Commission and the government have supported the constitutionality of the Commission in various ways. One argument advanced by the Commission is that it was properly placed in the judicial branch because it performs a judicial or quasi-judicial function. That argument is unpersuasive, as the primary Commission function of setting sentences is overtly legislative. See *United States v. Wittberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Even if this Court were to accept that argument, the Commission would nevertheless violate separation of powers by allowing non-Article III judges to exercise that power. *United States v. Swapp*, ___ F.Supp. ___, n.9 (D.Utah July 8, 1988) (*en banc*); *United States v. Bolding*, 683 F.Supp. 1003, 1005 n.3 (D.Md. 1988) (*en banc*); see also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982) (judicial power may not be exercised by non-article III Judges).

If the Sentencing Commission is viewed as implementing a congressional mandate by interpreting, monitoring, and enforcing that mandate, then it would be an executive agency. See *United States v. Arnold*, 678 F.Supp. 1463 (S.D.Cal. 1988). In that case, the separation of powers is undermined because Article III judges are performing non-judicial functions in another branch of government. *United States v. Olivencia*, ___ F.Supp. ___, 1988 Westlaw 36487 (S.D.N.Y. April 20, 1988).

¹⁶ This argument applies with equal force and validity to all members of the judiciary. Support for this position is found in *Hobson v. Hansen*, 265 F.Supp. 902, 931 (D.D.C. 1967) (three judge court) (Wright, J. dissenting): "The need to preserve judicial integrity is more than just the judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied."

A substantial number of district courts have considered the constitutionality of the Sentencing Reform Act, and have offered widely differing rationales for upholding or striking down the guidelines.¹⁷ NACDL, as *amicus curiae*, has participated in many of those cases, and urges this Court to review the decisions of the district courts throughout the country. Several decisions are worthy of special note for the clarity and depth of the legal analysis brought to focus. The Southern District of Florida, sitting *en banc* in *United States v. Bogle*, ___ F.Supp. ___, 1988 Westlaw 60560 (S.D.Fla. June 15, 1988), found the Commission unconstitutional on separation of powers grounds. District Judge Marcus, writing for the twelve to four majority, found that:

The Act violates the doctrine of separation of powers in that it has conferred unprecedented rulemaking authority upon the judiciary that sweeps far beyond the case and controversy requirement of Article III; and it has created a Commission combining the power of the judiciary and the executive in such a manner as to plainly conflict with the functions of the courts under Article III. In the process, the Act has had the effect of drawing the least responsive branch of

¹⁷ The following district courts are a few of the many that have ruled that the Sentencing Reform Act or the sentencing guidelines are unconstitutional. *United States v. Kane*, ___ F.Supp. ___, 1988 Westlaw 67692 (N.D.Ga. June 28, 1988); *United States v. Rosario*, ___ F.Supp. ___, 1988 Westlaw 64343 (N.D.Ill. June 23, 1988); *United States v. Molina*, ___ F.Supp. ___, 1988 Westlaw 63254 (D.Conn. June 16, 1988); *United States v. Mendez*, ___ F.Supp. ___, 1988 Westlaw 62634 (S.D.N.Y. June 16, 1988) (review of decisions striking and upholding guidelines); *United States v. Terrill*, ___ F.Supp. ___, 1988 Westlaw 59768 (W.D.Mo. June 13, 1988); *United States v. Brodie*, ___ F.Supp. ___, 1988 Westlaw 52990 (D.D.C. May 19, 1988); *United States v. Perez*, 685 F.Supp. 990 (W.D.Tex. 1988); *United States v. Lopez*, 684 F.Supp. 1506 (C.D.Cal. 1988) (*en banc*); *United States v. Estrada*, 680 F.Supp. 1312 (D.Mn. 1988).

government into an ongoing series of controversial policy debates about crime and punishment.

In another district court decision, Circuit Judge Heaney, sitting by designation, concluded in *United States v. Estrada*, 680 F.Supp. 1312 (D.Mn. 1988), that the sentencing guidelines violated separation of powers because the guidelines impermissibly grant substantive legislative power to the judiciary. Judge Heaney ruled that Congress can only delegate to the judiciary the authority to promulgate procedural rules.¹⁸

This Court's most recent analysis of the separation of powers doctrine, *Morrison v. Olson*, 108 S.Ct. 2597 (1988), validates the position advanced by amicus. In upholding the appointment of independent counsels under the 1978 Ethics in Government Act, this Court acknowledged that Article III judges may perform functions in addition to resolving cases and controversies, but only in exceptional and narrowly tailored circumstances. The limitation on the authority of Article III judges is meant to ensure judicial independence and prevent judicial encroachment into other governmental powers. The Court determined that the appointment by a special court division of an inferior office to investigate and prosecute crimes committed by high government officials was consistent with the Appointments Clause. None of the special court's express authority, to define the jurisdiction of the independent counsel, to terminate the appointment when the case is concluded, and to receive the final report, compromised the limits placed on Article III judges, since they were sufficiently analogous to traditional judicial functions. The interaction between branches, moreover, did not work any judicial

¹⁸ There is little doubt that the sentencing guidelines are substantive and not procedural. As the Court observed in *Miller v. Florida*, 107 S.Ct. 2446, 2543 (1987), there can be no debate that sentencing guidelines, as outcome determinative in individual cases, are substantive.

usurpation of the traditional powers of the executive branch.

For the very reasons that *Morrison* upheld the independent counsel provisions of the 1978 Ethics in Government Act, this Court should reach the opposite conclusion concerning the Sentencing Commission. First and foremost is the problem which occurs when the judiciary, in addition to making nationwide decisions of sentencing policy, also devises the law and is then called upon to apply it. Thus, in a single agency reposed in the judicial branch is the power to make the law (legislative authority), execute it (traditionally an executive function), and then apply it in individual cases (the normal judicial role). If such a comprehensive multi-dimensional agency is constitutional, our system no longer can rely on the checks and balances which have functioned to guard against the excessive arrogation of power. While the judiciary may be capable of exercising this tremendous combination of powers, the societal concern with too much government power is too great.

This unprecedented participation of judges in making and executing the law brings new meaning to the term judicial activism.¹⁹ Such extrajudicial conduct, granted by one of the most comprehensive pieces of criminal justice legislation in recent years, adversely affects the judicial institution and all judges, not just the ones who serve on the Commission. District Judge Kane recognized this assault in *United States v. Smith*, ___ F.Supp. ___, 1988 Westlaw 25223 (D.Colo. March 25, 1988):

The direct and blatant collaboration between the judiciary and the other branches of government

¹⁹ Discharging tasks other than deciding cases or controversies would "involve the judges too intimately in the process of policy and thereby weaken confidence in the disinterestedness of the judicatory functions." F. Frankfurter, "Advisory Opinions," in 1 *Encyclopedia of the Social Sciences* 475, 478 (1930).

the Act creates not only serves to tarnish the reputation of the judiciary as independent of and completely divorced from those other arms of government, but also in fact compromises its very independence . . .

Amicus is of the view that this combination of powers in one agency, located within the judicial branch, creates the impression of judicial dependence. District Judge Marcus, in the *Bogle* decision, held that same view:

Perhaps even more fundamental is the appearance of partiality where the judiciary becomes involved with setting the public policy of crime and punishment. As we have seen, fixing the rules of punishment for all crimes calls for the integration of a variety of considerations, including the public's perception of the offense, its "seriousness," and the efficacy of deterrence, as well as resource allocation. These are exactly the types of controversial and changing policy determinations from which the judiciary traditionally has been removed.

The Sentencing Commission tips that careful balance which has marked our constitutional system of government since its very inception, and the benefit to society does not outweigh the constitutional costs.

In summary as to this point, the membership of Article III judges on the Commission violates the traditional separation of powers doctrine which had its origins in the writings attributed to Montesquieu. See *Myers v. United States*, 272 U.S. 52, 116 (1926). "Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted." *The Federalist* No. 47, at 325-26 (J. Cooke ed. 1961). The problem here was recognized by this Court in *INS v. Chadha*, 462 U.S. 919, 951 (1983): "The hydraulic pressure

inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." The sentencing guidelines, the Sentencing Commission, and the enabling legislation must be declared unconstitutional as offensive to the separation of powers doctrine.

B. The Presidential Removal Power Over The Sentencing Commission Violates The Separation of Powers Doctrine.

Because the Sentencing Reform Act empowers the President to remove members of the Commission, 28 U.S.C. §991, including those federal judges who serve for six-year terms, the independence and neutrality traditionally associated with the judicial branch is destroyed. From a constitutional point of view, this removal power compromises the right of defendants to have their cases decided by judges who are free from the power and influence of a coordinate branch of government.

The determination of sentences in criminal cases traditionally has been divided between the legislature and the judiciary.²⁰ Congress establishes allowable sentences by statute, usually setting a discretionary maximum sentence or a mandatory minimum term up to a maximum. *United States v. Evans*, 333 U.S. 483 (1948); *United States v. Elkin*, 731 F.2d 1005, 1011 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984).

One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority and then only if punishment is authorized by Congress.

United States v. Viereck, 318 U.S. 236, 241 (1943). Once Congress has acted, it has been the judicial function to

²⁰ See generally *Dorszynski v. United States*, 418 U.S. 424 (1974); *Williams v. New York*, 337 U.S. 241 (1949).

determine the sentence applicable to a particular defendant. The role of the branches historically was separate and unimpeded by the executive. Judicial precedents in a variety of contexts leave unquestioned that control, apparent control, or improper influence over judicial functions by the executive, like the merger of legislative and judicial functions, impairs the constitutionally required neutrality of the courts. The neutrality inherent in the judicial branch is protected by the separation of powers doctrine.

The Sentencing Reform Act does not guarantee the required independence of the Commission, because the Commissioners are removable by the President, the head of the executive branch and the chief law enforcement officer. The significance of the executive authority was expressed by the Supreme Court:

A lawsuit is the ultimate remedy for a breach of the law, and it is to the President and not the Congress, that the Constitution entrusts the responsibility to 'take care that the law be faithfully executed.' Art. II, §3.

Buckley v. Valeo, 424 U.S. at 138.

In the past, the independence of agencies from improper interference by the executive has been preserved by limiting removal by the executive to removal for cause. *Weiner v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor*, 295 U.S. 602 (1935). But the Court has recognized that removal for cause is insufficient to assure adequate independence when the removing official is barred from that action by the Constitution. *Bowsher v. Synar*, 478 U.S. at 730 (1986), held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." Similarly, the Court held that removal for cause by the judiciary of an Article I judge is not adequate to protect the independence of a court exercising Article III powers.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. at 61-62.

The power of the President to remove a commissioner, functioning as a judicial officer, is unprecedented. It undermines the requisite independence of the judicial agency, and permits executive control over the Commission. Just as Congress cannot reserve to itself the power to remove those charged with the duty of carrying out the laws because that intrudes upon constitutional functions, *Bowsher v. Synar*; *Myers v. United States*, 272 U.S. 52 (1926), Congress cannot delegate to the executive the power to remove those who determine sentences.²¹

Congress cannot vest removal power of an independent judicial agency in the executive. *United States v. Olivencia*, ___ F.Supp. ___, 1988 Westlaw 36487 (S.D.N.Y. April 20, 1988) (Sentencing Reform Act unconstitutional because executive branch exercises unwarranted control over judicial agency). The words of *Bowsher* ring true here:

As the District Court observed, 'When an officer is appointed, it is only [the] authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey,' 626 F.Supp. at 1401.

106 S.Ct. at 3188. The Constitution does not allow the executive to control the determination of sentences; it follows that Congress cannot give to the President control of the Commission. As that power is central to the sta-

²¹ The view that "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments," *Chevron, USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), is simply inappropriate when the agency is determining sentences. Any argument that the President's removal power is unlimited only strengthens the position that the Commission's mandatory guidelines violate the separation of powers doctrine.

tutory framework, the Sentencing Reform Act is unconstitutional.

II. The Authority Granted To The Commission By Congress To Promulgate Sentencing Guidelines Represents An Unconstitutional And Excessive Delegation.

The lower court held that the sentencing guidelines were not promulgated pursuant to an unconstitutional delegation of legislative power. This conclusion was in marked contrast to the strong dissent filed by Chief District Judge Scott O. Wright. Amicus urges this Court to conclude that the Sentencing Reform Act of 1984 is unconstitutional in that it delegates excessive authority to the Sentencing Commission.

Article I of the Constitution provides: "All legislative powers . . . shall be vested in the Congress of the United States." This constitutional provision embodies the non-delegation doctrine, the notion that the "formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate." *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J. concurring). Inconsistent with this constitutional restriction of law making power, the Sentencing Commission exercises authority which can only be characterized as legislative power. See *INS v. Chadha*, 462 U.S. 919, 952 (1983).

Under Article I, Sec. 7, before legislation can become law it must have "passed the House of Representatives and the Senate" and "be presented to the President of the United States" for signature. The district court in *United States v. Swapp*, — F.Supp. —, 88-Cr-006J (D.Utah July 8, 1988), concluded "that the Guidelines promulgated by the Sentencing Commission are unconstitutional because they have not been passed by both houses of Congress and presented to the President . . ." "Congress cannot delegate its power to enact legislation in

contravention of the majority passage and presentment requirements of the Constitution."

The nondelegation doctrine is essential to the preservation of two constitutional safeguards that protect each individual's liberty and property: congressional accountability and judicial review. See Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223, 1283 (1985). Justice Harlan emphasized the importance of these safeguards in *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J. dissenting in part):

The [nondelegation] principle . . . serves two primary functions vital to preserving the separation of powers required by the Constitution. *First*, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

(emphasis in original; footnote omitted). Congress alone exercises "[t]he essentials of the legislative function, [which] are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus v. United States*, 321 U.S. 414, 424 (1944).

The roots of the nondelegation doctrine are found in the separation of powers doctrine, which serve to guarantee that each coordinate branch will perform its constitutionally assigned function and no other. See *Synar v. United States*, 626 F.Supp. 1374, 1383 (D.D.C.), *aff'd sub nom*, *Bowsher v. Synar*, 478 U.S. 714 (1986). With the Sentencing Reform Act's assignment to the judicial branch the power to create sentences, implement sentences, and judicially review those sentences, the Sentencing Commis-

sion has become a sort of super-agency, transcending the limitations imposed on the individual branches.

The delegation of legislative power to the Commission is so excessive that nothing the Commission does can be seen as merely following a carefully drafted congressional mandate. This itself renders the Sentencing Reform Act unconstitutional. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421-430 (1935). Congressional delegation of legislative or even quasi-legislative power is proper only if Congress "shall lay down by legislative Act an intelligible principle to which the person or body authorized to [exercise the delegated power] is directed to conform . . ." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Congress here has failed to set out a "framework of the policy which [it] has sufficiently defined." *National Cable Television, Inc. v. United States*, 415 U.S. 336, 342 (1974). Clear enunciation of policy enables the agency executing the delegated power, and a reviewing court, to determine whether the power has been properly exercised and is within the scope of the delegation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Yakus v. United States*, 321 U.S. at 425 (1944).

Congress has not provided the framework for the Sentencing Commission's exercise of its delegated power. In *United States v. Brodie*, — F.Supp. —, 1988 Westlaw 52990 (D.D.C. May 19, 1988), the court declared the Sentencing Reform Act unconstitutional on the grounds that "... the present Act would probably fail to pass muster, for Congress has given to the Sentencing Commission a mandate of such vagueness that it constitutes no real direction at all." In reaching this conclusion, the court relied upon *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("the power to define criminal offenses and to prescribe the punishment . . . resides wholly with the Congress.").

Brodie also pointed to Justice Brennan's concurrence in *United States v. Robel*, 389 U.S. 258, 276 (1967), stating, in the criminal law context, that the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy making function is passed on to other agencies, often not answerable or responsive in the same degree to the people." (footnote omitted).

United States v. Brittman, ___ F.Supp. ___, 1988 Westlaw 54178 (E.D.Ark. May 27, 1988), provided instructive guidance on the delegation issue. "Congress delegated its authority in a core legislative field, an area affecting the most fundamental of constitutional rights." The court noted that "delegated powers that, as in this case, affect liberty interests must be construed narrowly," relying on *Kent v. Dulles*, 347 U.S. 116, 129 (1958).

Litigants in the criminal justice system have a right to expect that the Congress, after its required factual investigation, policy development, and study, will promulgate the laws. Congress has the obligation to perform its required duty. The delegation of unbridled legislative power to the Commission represents a shirking of congressional responsibility and deprives citizens of the protections of the nondelegation doctrine. Congress cannot abandon its duties for reasons of political expedience. Nor can the judicial branch assume new duties because of a congressional desire to avoid extended debate and political complaint. The District Court in *United States v. Williams*, ___ F.Supp. ___, 1988 Westlaw 63614 (M.D.Tenn. June 23, 1988) (en banc), addressed these concerns in striking down the Sentencing Reform Act on excessive delegation grounds:

Finally, we observe that the Framers of the Constitution, in allocating all legislative powers to Congress, expected Congress, as a body of

elected representatives, to assume primary responsibility for the formulation of policy. This is true particularly in areas that impinge on personal liberties. Judging by its work product, the Commission made literally thousands of policy choices in formulating the guidelines. . . . These choices profoundly influence every citizen's liberty. . . . In our view, the fixing of criminal penalties requires a legislative policy determination and direct Congressional action. The determination of the comparative societal egregiousness of one crime as opposed to another would seem to be one of the most important functions committed to the legislative branch. Congressional delegation of this function to the Commission disrupts the proper balance between the coordinate branches and permits the Congress to evade its constitutional assigned role as chief policy maker.

In summary as to this point, Congress has written a statute which fails to define the parameters as to the selection of sentencing options. The "intelligible principles" required for valid delegation of authority are notably lacking here. Since a judge's decision making is channelled through the Commission's guidelines, and because Congress has not adequately instructed the Commission, it is evident that the Commission—not the sentencing court—is the body which sets the choice of sentence. This deliberate congressional omission leaves the delegation of authority to the Commission constitutionally deficient.

III. The Provisions Of The Sentencing Reform Act That Abolish Parole And Limit The Availability Of Good Time Cannot Be Severed From The Sentencing Guidelines.

Once the Court determines that the guideline portion of the Sentencing Reform Act is unconstitutional, the re-

maining question is whether other portions of the Act are severable. The principal aspects of severability which are relevant to this case are the abolition of parole and the substantial reduction in the rate of statutory and other forms of prison good time.²²

The Sentencing Reform Act, as a comprehensive sentencing law, establishes determinate federal sentencing. The Sentencing Commission, and the guidelines issued by it, are the central feature of this reform, without which the remaining portions of the Sentencing Reform Act would be fragmented and would lead to results contrary to the overall legislative purposes. It is the position of amicus that Congress would not have enacted these lesser pieces of the package without the guidelines. This Court should not sever these other revisions of federal sentencing practices from the fate of the guidelines.²³

As the Court stated in *Alaska Airlines, Inc. v. Brock*, 107 S.Ct. 1476, 1480 (1987):

The standard for determining the severability of an unconstitutional provision is well established: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refin-*

²² In addition to these features of severability, other important issues should be addressed by the Court. For example, if the district courts are to return to a system of pre-guideline sentencing, shouldn't the former provisions of Rule 35(b), F.R.Cr.P. be available to a defendant? See *United States v. Molina*, ___ F.Supp. ___, 1988 Westlaw 63254 (D.Conn. June 16, 1988) (Rule 35 retained upon a finding that the guidelines are unconstitutional).

²³ Under the pre-guideline system, it was the Parole Commission—rather than the sentencing court—which established the actual release date of a convicted offender. See, e.g., *United States v. Grayson*, 438 U.S. 41, 48 (1978).

ing Co. v. Corporation Commission of Oklahoma,
286 U.S. 210, 234 (1932).

The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 1481 (emphasis in original). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent. . ." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Both the statute²⁴ and its legislative history made clear that the abolition of parole and the new good time rules apply only to sentences that are imposed under a system of guideline sentencing. See 18 U.S.C. §§3551, 3558, 3624.

Congress intended that the guidelines, including the abolition of parole the new good time rules, operate as a package. For that reason, Congress delayed implementation of the parole and good time changes until the guidelines became effective. Congress created this package to insure that "the sentencing guidelines system will not replace the current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances" until the guidelines "replace the existing sentencing system." Report at 188-89; 1984 U.S. Code Cong. & Admin. News at 3372-3373.

The Senate Report shows that the guidelines were the cornerstone of the determinate sentencing system—which Congress passively endorsed in its entirety—but not in its component parts. The "comprehensive plan" for determinate sentencing is accomplished only through the interrelationship of three major reforms: mandatory sentencing guidelines; abolition of parole; and substantial reduction of

²⁴ In assessing congressional intent, one must first look to the language and structure of the statute. *Consumer Product Safety Commission v. G.T.E. Sylvania Inc.*, 447 U.S. 102, 108 (1980).

existing good time. The combination of these elements of sentencing reform carry out the policy goals sought to be furthered by a system of guidelines sentencing. None of these elements of sentencing reform function independently.

Fundamental fairness mandates a return to the entire pre-existing scheme upon a finding that the guidelines are unconstitutional. In a supplemental order issued in *United States v. Bogle*, ___ F.Supp. ___, Case No. 87-856-Cr-Marcus (S.D.Fla. June 30, 1988) (en banc), the court found on the issue of severability that defendants sentenced for post-November 1, 1987 offense conduct are eligible for parole if not otherwise precluded by statute. *E.g.*, *United States v. Allen*, 685 F.Supp. 827 (N.D.Ala. 1988) (en banc) (old law applies upon conclusion that guidelines unconstitutional). One of the laudable goals of the Sentencing Reform Act was consistency and uniformity. These goals will be compromised by a determination of severability. In order to reduce unwarranted disparity in sentencing, convicted defendants must also be able to avail themselves of the former provisions of Rule 35(b) to serve as a check on disparate sentences.

In summary as to this point, once the Court determines that the guidelines are unconstitutional, the Court must find all the other associated provisions of the Sentencing Reform Act incapable of severance and strike them accordingly.

CONCLUSION

Amicus asks this Court to declare the sentencing guidelines and the Sentencing Reform Act of 1984 unconstitutional.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

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TOMMASO D. RENDINO, HAROLD R. TYLER,
AND WILLIAM F. WELD AS AMICI CURIAE
IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether the Sentencing Reform Act of 1984, which established the United States Sentencing Commission as an independent agency in the judicial branch with authority to promulgate guidelines governing the sentencing of federal criminal offenders, violates constitutional principles of separation of powers.



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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1904

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v.

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No. 87-7028

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v.

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**On Writ of Certiorari Before Judgment to the
United States Court of Appeals
for the Eighth Circuit**

**BRIEF FOR
JOSEPH E. DIGENOVA, KENNETH R. FEINBERG,
MARVIN E. FRANKEL, GEDNEY M. HOWE, III,
TOMMASO D. RENDINO, HAROLD R. TYLER,
AND WILLIAM F. WELD AS AMICI CURIAE
IN SUPPORT OF AFFIRMANCE**

INTEREST OF THE AMICI CURIAE

Amici curiae are individuals who were actively involved in the evolution of the federal sentencing reform effort in Congress that led to the passage of the Sentencing Reform Act of 1984. At the invitation of the Sentencing Commission, *amici* participated, through public hearings and working groups, in the Commission's open,

broadly-inclusive process of developing sentencing guidelines. Thus, *amici* are knowledgeable about the manner in which the Commission conducted its mission pursuant to the Act. *Amici* believe that a proper understanding of the historical development of the legislation establishing the Commission, and of its initial implementation by the Commission, is important to the Court's resolution of the constitutional issues presented in this case.

Amici curiae and their specific association with the work of the Commission are as follows: (1) Joseph E. DiGenova, former United States Attorney and member of the prosecutors working group; (2) Kenneth R. Feinberg, former Special Counsel to the Senate Committee on the Judiciary and one of the principal authors of the legislation establishing the Commission; (3) Marvin E. Frankel, former United States District Judge and the leading judicial spokesman for the need for sentencing reform; (4) Gedney M. Howe, III, member of the defense attorneys working group; (5) Tommaso D. Rendino, United States Probation Officer, President, Federal Probation Officers Association and member of the probation officers working group; (6) Harold R. Tyler, former United States District Judge and Deputy Attorney General; (7) William F. Weld, former Assistant Attorney General and member of the Department of Justice working group.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court stated in *Ex Parte United States*, 242 U.S. 27, 42 (1916), that it is "indisputable" that "the authority to define and fix the punishment for crime is legislative," that Congress has the power "to bring within judicial discretion for the purpose of executing the statute elements of consideration which would otherwise be beyond the scope of judicial authority," and that "the right to relieve from the punishment fixed by law * * * belongs to the executive department." The issue in this

case is whether Congress may create a commission in the judicial branch, composed of both judges and non-judges, to channel the "judicial discretion" previously exercised in imposing sentence on persons convicted of federal offenses. We fully agree with the *amicus curiae* brief filed by the Sentencing Commission that Congress acted well within its authority under the Necessary and Proper Clause when it enacted the Sentencing Reform Act of 1984.

The constitutionality of the current sentencing system cannot be assessed, however, without an appreciation of Congress's historical allocation of sentencing-related powers and the particular circumstances that led Congress to enact the Sentencing Reform Act—*i.e.*, the substantial disparities, inconsistencies and uncertainties in federal sentencing policy and practices that raised questions of fundamental fairness and threatened to bring the criminal justice system into disrepute. These problems, which had defied every other remedial approach, led Congress to conclude that delegation to a permanent, expert sentencing commission was the most effective and, perhaps, the only workable means of accomplishing these reforms.

Part A of this brief shows that Congress has historically delegated certain decisions regarding sentencing—by which we mean the determination of the length and content of the sentences actually served by federal offenders—to both the executive and judicial branches of government. Part B sets out the salient defects Congress found in the prior federal sentencing system of indeterminate sentences whose actual duration depended on the combined, largely unfettered, discretion of district judges and the Parole Commission. These defects included a lack of coherent sentencing principles, unwarranted sentencing disparities, and pervasive uncertainty as to the actual length of sentences. The persistent and serious nature of these problems eventually convinced Congress—after more than a decade of debate and numerous false

starts—to create a specialized sentencing commission and to delegate the evolutionary task of drafting guidelines to that permanent expert body.

Part C shows that Congress itself made the basic structural and substantive decisions with respect to the overhaul of the federal sentencing system and provided the newly-created Sentencing Commission with detailed guidance as to the scope and form of the guidelines and the factors that should inform their development. Part D describes the manner in which the Commission developed the guidelines, with particular reference to the influence of congressional directives on the Commission's decision-making. Part E explains that attaining meaningful sentencing reform depends upon the guidelines being evolutionary and that a permanent and independent sentencing commission is critical to an evolving set of guidelines.

ARGUMENT

CONGRESS ACTED WITHIN ITS CONSTITUTIONAL POWERS IN ESTABLISHING AN INDEPENDENT COMMISSION TO ELIMINATE SENTENCING DISPARITY AND PROMOTE CERTAINTY OF PUNISHMENT.

A. The History Of Federal Sentencing Practices Illustrates That Congress's Delegation Of Authority To The Commission Was Proper.

The modern approach to federal sentencing has presupposed broad grants of sentencing discretion by Congress to both the executive and the judiciary. Although this Court has long recognized that the power "to define a crime, and ordain its punishment" is vested in the legislature, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), the Constitution does not require that Congress impose a mandatory, fixed sentence for every federal offense. Throughout this century, Congress has repeatedly allocated and reallocated portions of its power to ordain punishment to the other branches of government.

In 1910, Congress created the United States Parole Board as an agency in the executive branch "to administer the parole system as a part of the program to rehabilitate federal prisoners and restore them to useful membership in society." *Hyser v. Reed*, 318 F.2d 225, 233 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963). Fifteen years later, Congress gave the judiciary specific discretionary powers over sentencing when it passed the Federal Probation Act of 1925, 43 Stat. 1259. Prior to the passage of the Probation Act, federal courts lacked authority to place an offender on probation or otherwise suspend a sentence. See *Ex parte United States*, *supra*. The Probation Act authorized federal judges to place a defendant on probation if doing so would serve "the ends of justice and the best interest of the public, as well as the defendant." *Burns v. United States*, 287 U.S. 216, 220 (1932). The Probation Act created "an exceptional degree of flexibility in administration" in order to facilitate "comprehensive consideration of the particular situation of each offender which would be possible only in the exercise of a broad discretion." *Id.* It authorized probation for all offenses except those punishable by death or life imprisonment and gave sentencing judges discretion to suspend even where Congress had legislated a minimum sentence (unless Congress expressly provided otherwise). *Rodriguez v. United States*, 480 U.S. 522 (1987).

Until the passage of the Sentencing Reform Act in 1984, however, Congress imposed virtually no enforceable limitation on the "unfettered sentencing discretion of federal district judges." *Dorszynski v. United States*, 418 U.S. 424, 437 (1974). See Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 916 (1962) (in the United States, the discretion of the sentencing judge is "virtually free of substantive control or guidance"). The absence of any standards to guide district judges' sentencing discretion, together with the virtual unreviewability of sentences, as

long as they were within statutory limits, created the risk that this broad discretion would result in "capricious and arbitrary sentences." *United States v. Grayson*, 438 U.S. 41, 48 (1978).

An early initiative to bring some order to federal sentencing was taken by the United States Parole Board when it adopted detailed Parole Release Guidelines for adult prisoners in 1973. 38 Fed. Reg. 31942 (1973). The guidelines established "a 'customary range' of confinement for various classes of offenders," using a "matrix" that combined "a 'parole prognosis' score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an 'offense severity' rating, to yield the 'customary' time to be served in prison." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 391 (1980). The Parole Board's guidelines served, indirectly, as a check on judicial sentencing discretion, at least with respect to sentences of imprisonment that the court did not suspend by granting probation.

The Parole Board's authority for this initiative was uncertain until 1976 when Congress enacted the Parole Commission and Reorganization Act ("PCRA"), 90 Stat. 219 (1976), which "provided the first legislative authorization for parole release guidelines." *United States Parole Commission v. Geraghty*, 445 U.S. at 391. The PCRA replaced the Parole Board with a newly created Parole Commission—"established * * * as an independent agency in the Department of Justice" (90 Stat. 219-20)—and required the Parole Commission to promulgate guidelines for granting or denying parole to eligible prisoners. 90 Stat. 220-21. The PCRA preserved the previously established division of sentencing responsibility among the three branches, leaving "the extent of a federal prisoner's confinement * * * initially [to be] determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on pa-

role is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially fixed term." *Grayson*, 438 U.S. at 47.

Statutory and constitutional challenges to the PCRA and the parole guidelines focused on the extent to which the district judges' imposition of sentence constrained the discretion of the Parole Commission. In *Addonizio v. United States*, 573 F.2d 147, 150 (3d Cir. 1978), the Third Circuit held that "resentencing is required in a [28 U.S.C.] § 2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of a sentence * * *." Shortly thereafter, in *Geraghty v. United States*, 579 F.2d 238 (3d Cir. 1978), the Third Circuit stated that, because the parole guidelines focused primarily on "the very factors that are available to the sentencing judge," "serious questions are raised whether the constitutional protections provided by an independent judiciary are being undermined." 579 F.2d at 261.

This Court granted certiorari in both *Addonizio* and *Geraghty*. In *Geraghty*, the Court did not reach the separation-of-powers issues, confining itself to ruling on issues of class certification and mootness, and remanding the case for further proceedings. 445 U.S. 388 (1980). In *United States v. Addonizio*, 442 U.S. 178 (1979), however, the Court (again without addressing the constitutional question) flatly rejected the Third Circuit's approach:

The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the dispari-

ties in the sentencing practices of individual judges. The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.

442 U.S. at 188-89 (Footnotes omitted).

After the decision in *Addonizio*, the courts of appeals uniformly rejected claims that the PCRA, construed as authorizing the parole guidelines, was "unconstitutional as an impermissible delegation of a judicial function or a standardless delegation of a legislative function." *Geraughty v. United States Parole Commission*, 719 F.2d 1199, 1208 (1983), *cert. denied*, 465 U.S. 1103 (1984). See also *Artez v. Mulcrone*, 673 F.2d 1169 (10th Cir. 1982); *Page v. United States Parole Commission*, 651 F.2d 1083 (5th Cir. 1981); *Moore v. Nelson*, 611 F.2d 434 (2d Cir. 1979).

B. The Federal Sentencing System Based On The Outmoded Rehabilitation Model Led To Arbitrary and Indefensible Distinctions In Criminal Sentences.

Although Congress's delegations of its power to ordain punishment have been consistently upheld as permissible and compatible with separation of powers principles, over time Congress became profoundly dissatisfied with the quality of justice that resulted from these delegations. See S. Rep. No. 98-225, 98th Cong., 1st Sess. 37 (1983). As viewed by Congress, federal sentencing was "in desperate need of reform", S. Rep. No. 96-553, 96th Cong., 2d Sess. 912 (1979), because of two overriding problems: the absence of guidelines to channel judges' sentencing discretion, S. Rep. No. 96-225, *supra*, at 38, and the division of sentencing authority between the courts and the Parole Commission, which promoted uncertainty in the length of sentences actually served by convicted offenders. S. Rep. No. 98-225, *supra*, at 46-47.

By the 1970s, there was growing evidence before Congress that the separate and uncoordinated grants of wide discretion to individual judges and the Parole Commission had failed dramatically. Studies of correctional treatment programs repeatedly demonstrated their ineffectiveness in reducing recidivism and led Congress to conclude that both sentencing judges and parole officials "know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine whether or when a particular prisoner has been rehabilitated." S. Rep. No. 98-225, *supra*, at 40.

Even worse, since district judges held widely varying views on the purposes of sentencing and the wisdom of the rehabilitation model, and were given virtually no guidance on how to select an appropriate sentence, there was an inevitable disparity in the sentences imposed on similarly situated defendants. Studies showed wide disparities among districts and circuits. See P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System* 5, Table 1 (1977). For example, in 1974 the average federal sentence for bank robbery was 11 years, but in the Northern District of Illinois it was only five and one-half years. S. Rep. No. 98-225, *supra*, at 41. Similarly, "[t]he range in average sentences for forgery [ran] from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences [were] 22 months in the First Circuit and 42 months in the Tenth Circuit." Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 1-3, reprinted in 119 Cong. Rec. 6060 (1973).

Moreover, and more troubling, the evidence showed that there were major distinctions among individual judges and offenses even *within* a single district or circuit. In 1974, 50 federal district judges within the Second Circuit were given 20 identical presentence reports

drawn from actual cases and were asked to indicate the sentence that they would impose on the defendant. "The variations in the judges' proposed sentences in each case were astounding." S. Rep. No. 98-225, *supra*, at 41. In one extortion case, for example, the sentences ranged from 20 years imprisonment and a \$65,000 fine to three years imprisonment and no fine. A. Partridge & W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* 5 (1974). Experienced judges were no more of one mind than those recently appointed to the bench. *Id.* at 34-35. And the problem was not merely one of "tough" and "lenient" judges; even the same judge gave sentences that were much longer than average in one case and much shorter than average in another. *Id.* at 36-40. These findings of wide, unexplained disparities in sentencing were confirmed by numerous other studies. See, e.g., Yankelovich, Skelly & White, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions*, Exhibit III (1981); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975); *Seminar and Institute on Disparity of Sentences for Sixth, Seventh and Eighth Judicial Circuits*, Highland Park, Illinois, 1961, 30 F.R.D. 401 (1962).

The pervasive, unwarranted disparities in the length and severity of federal sentences caused knowledgeable commentators to conclude that something was seriously wrong. Professor Davis remarked:

The power of judges to sentence criminal defendants is one of the best examples of unstructured discretionary power than can and should be structured. The degree of disparity from one judge to another is widely regarded as a disgrace to the legal system. All the elements of structuring are needed—open plans, policy statements and rules, findings and reasons, and open precedents.

K. Davis, *Discretionary Justice: A Preliminary Inquiry* 133 (1969). Similarly, Judge Frankel argued that the

federal system of indeterminate sentences, of "individualized" justice, was really one of lawless discretion, with no agreement on the purposes of sentencing or even the criteria to be considered or the weight to be given to such criteria:

The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergencies are explainable only by the variations among the judges, not by material differences in the defendants or their crimes. * * * The disparities, if they are no longer astonishing, are horrible.

M. Frankel, *Criminal Sentences: Law Without Order* 21 (1972). See also A.B.A. Project on Minimal Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* 1-2 (1968) ("in no other area of our law does one man exercise such unrestricted power. No other country in the free world permits this condition to exist"); Report of the Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* 12-13 (1976) (criticizing sentencing practices on the ground that there are "few if any rules, standards, or guidelines * * * to guide the exercise of judicial and administrative sentencing discretion"). In sum, the federal sentencing system was truly "a wasteland in the law." Frankel, *Lawlessness in Sentencing*, 41 U. Cinn. L. Rev. 1, 54 (1972).

Compounding the problem of sentencing disparity was the fact that sentencing authority was divided between the federal courts and the Parole Commission. It became increasingly clear that the courts and the Parole Commission often worked at cross purposes in the sentencing of convicted criminal offenders. S. Rep. No. 96-553, *supra*, at 915. The sentencing judge would sentence a convicted offender to a term of imprisonment, but federal law permitted the offender's early release by the Parole Commission.

Congress was well aware of these criticisms of the federal sentencing system. Indeed, the first legislative effort to address the lack of uniformity in federal sentencing came three decades ago, in 1958, when Congress, adopting a recommendation of the Judicial Conference of the United States, authorized the creation of sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing" "[i]n the interest of uniformity in sentencing procedures." Pub. L. No. 85-752, 72 Stat. 845 (1958), 28 U.S.C. § 334(a) (1964). The legislation reflected Congress's concern with "the existence of widespread disparities in the sentences imposed by Federal courts * * * in different parts of the country, between adjoining districts, and even in the same district." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958).

Few districts accepted Congress's invitation to form sentencing councils. Only four councils were in operation by 1975. See Diamond & Zeisel, *supra*, at 117. Moreover, because the sentencing institutes and councils were purely advisory, their influence was limited. "For the most part the judges tend to record their differences, reassure each other of their independence, and go home to do their disparate things as before." Frankel, *supra*, 41 U. Cinn. L. Rev. at 20. Those councils that did exist were able to eliminate only about one-tenth of existing sentence disparities. Diamond & Zeisel, *supra*, at 147.

In light of this experience, many observers believed that the problem could not be solved without sentencing guidelines to control judicial discretion. The sentencing commission approach, originally conceived by Judge Frankel, gained wide support among judges and, eventually, the American Bar Association. See, e.g., Frankel, *Criminal Sentences*, *supra*, at 111-123; Tyler, *Sentencing Guidelines: Control of Discretion in Federal Sentencing*, 7 Hofstra L. Rev. 11 (1978); Newman, A

Better Way to Sentence Criminals, 63 A.B.A.J. 1563, 1566 (1977); *A.B.A. Standards for Criminal Justice*, Standards 18-3.1 to 18-3.5 (2d ed. 1980). In addition, several studies proved the feasibility of sentencing guidelines. See L. Wilkins, J. Kress, D. Gottfredson, J. Caplin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1978); P. O'Donnell, M. Churgin & D. Curtis, *supra*.

Similarly, despite adoption of the PCRA, a bipartisan consensus began to emerge in Congress that reforming the Parole Commission's functions was mere tinkering and would not adequately address the fundamental problems of sentencing disparity and uncertainty. Instead, it was decided that the division of sentencing authority should be abolished and that the sentencing function should be consolidated in the sentencing court. In this way, indeterminate sentencing—with the ultimate prisoner release date determined by the Parole Commission—would be replaced by a new system of determinate sentencing, with the sentencing function resting with the sentencing judge. See S. Rep. No. 96-553, *supra*, at 922-932; S. Rep. No. 98-225, *supra*, at 59-60.

Perhaps the most important antecedent and greatest impetus to the eventual passage of the Sentencing Reform Act was Congress's protracted effort to enact comprehensive federal criminal code reform. See S. Rep. No. 96-553, *supra*, at 1, 37. Beginning with consideration of the 1971 Final Report of the National Commission on Reform of Federal Criminal Laws, and through almost a decade of extensive hearings and debates, Congress attempted to eliminate the systemic problems of sentencing disparities and uncertainty through statutory amendment of individual criminal laws. This massive undertaking included attempts to standardize countless definitions, simplify elements of scienter and, above all, fundamentally to reorganize federal criminal law through a coherent and comprehensive classification of offenses according to simi-

larity of conduct and the relative seriousness of the offense. As the Senate Report noted:

The sentencing structure of present Federal criminal law * * * cannot escape criticism. Indeed, it is riddled with irrationality and inconsistency. In title 18 alone, there are no fewer than seventeen different maximum terms, apart from the death penalty, and fourteen different fine levels. Only occasionally, as if by accident, are fines related to the amount of injury inflicted or gain realized by the offender, and then the ratio of fine to amount involved may be one-to-one, or three-to-one. Grading of offenses is also erratic. Similar conduct is often treated with gross disparity. For example, robbery of a Federally insured bank carries a maximum term of 20 years while robbery of a Post Office carries a 10 year maximum sentence. In plain terms the present penalty structure offends the precept of equity before the law.

S. Rep. No. 96-553, *supra*, at 5; see also S. Rep. No. 98-225, *supra*, at 39-40; *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. (1977).

Congress ultimately abandoned its attempt to effect a comprehensive overhaul of the entire federal criminal code, but its efforts to reform sentencing practices continued. Having given years of legislative consideration to the question, Congress concluded that the task of bringing uniformity and consistency to the federal sentencing system could best be accomplished by delegating a portion of its power to determine appropriate punishment to a commission of highly qualified experts in the sentencing and corrections field. Congress correctly foresaw that writing sentencing guidelines and, indeed, the larger task of sentencing reform would be an evolutionary process requiring continuous review, and it therefore designed a commission "to encourage the constant refinement of sentenc-

ing policies and practices as more is learned about the effectiveness of different approaches.” S. Rep. No. 98-225, *supra*, at 161. The need for an ongoing process of guideline revision, combined with Congress’s recognition of its own institutional limitations in directly undertaking such a task, led Congress to assign these responsibilities to a specialized body created expressly for that purpose. See S. Rep. No. 96-553, *supra*, at 931 (footnote omitted):

Some have questioned the idea of a Commission promulgating the guidelines rather than the Congress. These critics view the Commission idea as an abdication of Congressional responsibility. The Committee, however, views the Commission as a major asset of the bill. Congress historically has delegated authority to a host of administrative agencies where the task involves complex issues requiring continuous monitoring and fine tuning by experts in the field. The Committee believes the creation of sentencing guidelines contemplated under this bill similarly requires expert attention.

Congress placed this specialized body in the judicial branch because of its “strong feeling that, even under this legislation, sentencing should remain a judicial function.” *Id.* at 1229.

In sum, the history of federal sentencing is characterized by broad congressional delegations of certain powers to the federal judiciary and to the judicial branch, and by a series of congressional efforts to confront the problems of sentencing disparity and uncertainty. After trying and reviewing a number of suggested remedies, including sentencing institutes and recodification of the entire criminal code, Congress concluded that the persistence and urgency of the problems could be satisfactorily addressed only through the creation of a specialized commission (“a major asset”) with an ongoing mission—that of creating, monitoring and constantly revising a system of determinate sentencing guidelines.

C. The Sentencing Reform Act Of 1984 Provided The Sentencing Commission With Detailed Guidance In Promulgating Sentencing Guidelines Designed To Eliminate Disparities And Uncertainties In The Sentencing Of Federal Criminal Offenders.

Congress's principal concerns in enacting the Sentencing Reform Act were the elimination of unwarranted disparities while establishing proportionality and certainty in sentencing. S. Rep. No. 98-225, *supra*, at 52. The prior regime of indeterminate sentencing had produced widely different sentences for similar offenders convicted of similar offenses. Accordingly, the new sentencing system was "intended to treat all classes of offenses committed by all categories of offenders consistently." *Id.* at 51.

Congress sought to achieve these purposes by requiring the Sentencing Commission to promulgate a system of sentencing guidelines that would take account of the relevant facts and circumstances of the particular offense as well as the particular criminal history and other background information concerning that offender. *See* 28 U.S.C. § 994(b)(1). "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender." S. Rep. No. 98-225, *supra*, at 52-53. Overall, the objective was to develop a complete set of guidelines that covered "in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.* at 168. By requiring that "a comprehensive examination of the characteristics of the particular offense and the particular offender" occur prior to sentencing, Congress thought that the guidelines would increase "the individualization of sentences as compared to current law." *Id.* at 53.

Congress also intended that the Commission create "numerous" sentencing ranges within the guidelines.

Each range would "describ[e] a somewhat different combination of offender characteristics and offense circumstances * * * [reflecting various] aggravating and mitigating circumstances" for any given offense. S. Rep. No. 98-225, *supra*, at 168. While under 28 U.S.C. § 994 (b) (2) no individual guideline range may vary by more than 25% between its minimum and maximum terms of imprisonment, Congress expected that the ranges would "cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense." *Ibid.*

As the Senate Report observed, the Sentencing Reform Act "contains a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kind of sentences that may be imposed to carry out these purposes, and prescribes the factors that should be considered in determining the kind of sentence to impose in a particular case." S. Rep. No. 98-225, *supra*, at 50.

To begin with, Congress itself set forth the purposes of criminal punishment in the federal system. 18 U.S.C. § 3553(a) (2). While some commentators had argued that sentencing should principally be determined on the basis of "just deserts," and others had urged that considerations of "crime control" be given primacy, the Act "rejected a single doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing." U.S. Sentencing Commission, *Supplemental Report on the Initial Sentencing Guidelines and Policy Statement* 16 (1987) ("Supplementary Report"). The guidelines reflect this legislative judgment.

In addition to stating these guiding premises, the Act charged the Sentencing Commission with promulgating sentencing guidelines that "provide certainty and fairness in meeting the purposes of sentencing," while "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" and "maintaining sufficient flexibility to permit individualized sentences" in appropriate

cases. 28 U.S.C. § 991(b)(1)(B). Thus, Congress both specified the general purposes that should inform the sentencing guidelines and established "two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be avoided unless it is warranted by other factors." S. Rep. No. 98-225, *supra*, at 161. The Commission was further required to revise the guidelines periodically to take into account advances in "knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

The Act also spelled out in some detail the matters to which the guidelines apply and the form the guidelines must take. The guidelines must address four types of sentencing determinations to be made by federal judges: (1) whether to impose a sentence of probation, a fine, or imprisonment; (2) what size fine or what term of probation or imprisonment to impose; (3) whether imprisonment should be followed by supervised release, and if so for what term; and (4) whether multiple sentences should run concurrently or consecutively. 28 U.S.C. § 994(a)(1). In promulgating such guidelines, the Commission was required to categorize offenses and defendants and to establish a sentencing range "for each category of offense involving each category of defendant." 28 U.S.C. § 994(b)(1). This range must be "consistent with all pertinent provisions of title 18," and, in the case of a sentence of imprisonment, may vary by no more than 25% or 6 months from the maximum to the minimum. 28 U.S.C. § 994(b)(1), (2). Congress thus itself decided (and insured that the Commission would carry out its decision) that the federal sentencing system should consist of determinate sentences within a narrow range, thereby alleviating the inequality and uncertainty that were the most mischievous features of the prior law.

Moreover, in establishing categories of offenses, the Commission must decide how much (if any) weight to give to seven enumerated factors. These factors include the grade of the offense, the mitigating or aggravating circumstances, the harm caused by the offense, the community's view of the gravity of the offense, the public concern the offense generated, the deterrent effect a particular sentence may have on the commission of the offense by others, and the current incidence of the offense. 28 U.S.C. § 994(c). And in establishing categories of defendants for use in the guidelines and policy statements, the Commission must decide how much (if any) weight to give to eleven enumerated factors. These factors include the defendant's age, education, vocational skill, mental and emotional condition, physical condition, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on crime for his livelihood. 28 U.S.C. § 994(d).

The Commission's discretion is further constrained by a number of additional directives in the Act. 28 U.S.C. § 994(e)-(n). Some of these directives require the Commission to ensure that certain factors, such as "the race, sex, national origin, creed, and socioeconomic status of offenders," are given no weight in the guidelines. 28 U.S.C. § 994(d). Some directives require the Commission to give special weight to a particular factor or circumstance: for example, the guidelines must specify a term of imprisonment at or near the maximum for adult offenders who have been convicted of a third violent felony. 28 U.S.C. § 994(h). Other directives require the Commission to discount the significance of a particular factor or circumstance: for example, in recommending imprisonment or the length of imprisonment, the guidelines must "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). And yet others require the Commission to ensure that the guidelines pre-

vent "a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. § 994(k).

None of this legislative guidance, extensive as it is, negates the substantial powers and responsibilities vested in the Commission by Congress. S. Rep. No. 98-225, *supra*, at 160. But it is clear that Congress went to considerable lengths to make certain that the guidelines would effectively implement the detailed plan worked out by Congress itself. Indeed, even where Congress delegated an important choice, Congress cabined and defined that choice for the Commission. For example, Congress decided to "provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission and, under its guidelines, the courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases." *Id.* at 91. See 28 U.S.C. § 994(a)(1). But Congress provided for maximum and minimum terms of probation, 18 U.S.C. § 3561(b), delineated the choice the Commission was to make, and required the Commission to make that choice in a manner that would "achiev[e] the purposes of sentencing set forth in section 3553(a)(2)." S. Rep. No. 98-225, *supra*, at 90. This pattern of congressional guidance pervades all aspects of the delegation to the Commission.

What is more, Congress gave the Commission explicit instructions concerning how to go about translating these statutory goals and criteria into discrete guidelines. It directed the Commission to follow an empirical approach using data reflecting historic sentencing practices. Thus, 28 U.S.C. § 994(m) provides that:

— as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission [shall] ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involv-

ing sentences to terms of imprisonment, the length of such terms actually served.

Accordingly, the Commission was not to set sail on uncharted seas: it was to anchor its project firmly to existing practice as a point of departure, adopting changes only where necessary to achieve the congressional purposes and in order to comply with other specific directions in the Act. *See* S. Rep. No. 98-225, *supra*, at 177-178.

D. The Sentencing Commission Closely Adhered To Its Statutory Mandate In Developing And Issuing Sentencing Guidelines.

The Sentencing Reform Act was signed into law by President Reagan on October 12, 1984, and the Commissioners were appointed and confirmed by the end of 1985. Less than a year later, the Commission published a preliminary draft of the sentencing guidelines, and it promulgated its final guidelines and policy statements seven months thereafter, on April 13, 1987. The Commission subsequently issued a series of technical, clarifying and conforming amendments on May 1, 1987, and has promulgated a number of additional amendments since that time.

As noted above, the congressional mandate to the Sentencing Commission was twofold: (1) using current practices as a starting point, to establish an initial set of sentencing guidelines that reduced unwarranted sentencing disparities and uncertainties, and (2) to monitor and evaluate the impact of the initial sentencing guidelines and make such refinements as necessary to achieve Congress's goal of fair, certain and more uniform sentences. The Commission fulfilled the first part of this mandate—to take an initial step toward reducing unwarranted sentencing disparities, using present practice as the starting point—in the following way.

First, in terms of process, the Commission adhered to the congressional mandate of developing the guidelines in an open manner that drew advice and criticism from

a broad cross-section of interested groups and individuals. See 28 U.S.C. § 994(v); S. Rep. No. 98-225, *supra*, at 181.¹ The Commission solicited information from a variety of federal agencies concerning sentencing issues,² held public hearings on specific sentencing issues critical to the development of the guidelines,³ published and widely circulated for public comment several guideline drafts, held hearings on these drafts, and subjected alternate approaches to intensive public debate and case testings. Thus, the guidelines sent to Congress in April 1987 were the product of considered judgments that the Commission intended to further refine in the light of actual sentencing experience with the guidelines.⁴

Second, as instructed by 28 U.S.C. § 994(m), the Commission determined guideline base offense levels by conducting an empirical analysis of nearly 100,000 federal convictions during a two-year period, including detailed scrutiny of more than 10,000 presentence reports. *Sup-*

¹ The Commission established and regularly consulted with advisory and working groups of federal judges, United States Attorneys, Federal Public Defenders, state district attorneys, federal probation officers, private defense attorneys, academics and researchers knowledgeable in the fields of sentencing and corrections. Supplementary Report 9.

² The Commission received information from and met with representatives of the Department of Justice, Bureau of Prisons, the Departments of Treasury, Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission. *Id.* Other resource groups contributing to the Commission's work were the Judicial Conference, the National Institute of Sentencing Alternatives, and the National Institute of Corrections.

³ In connection with six hearings on specific sentencing issues, the Commission received oral testimony from 74 witnesses and written comments from more than 550 respondents. *Id.* at 10.

⁴ The Commission's highly public process is consistent both with the statutory command and with the trend toward greater public involvement in judicial branch rules. See, e.g., Fed. R. Civ. P. 83 (requiring notice and public comment prior to promulgation of local rules).

plementary Report 16. As it considered each frequently committed crime, the Commission referred to data that set forth estimates of sentences, the extent to which a specific characteristic (such as the presence of a weapon or victim injury) typically affected the duration of the sentence imposed, and the distribution of the mean. See *Hearings on Sentencing Commission Guidelines Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. xx (1987) (statement of Commissioner Breyer).

Third, the Commission decided which specific offense characteristics to add to the basic description of each crime, and the weight to be accorded each characteristic, by examining the factors that had actually accounted for enhanced sentences for that crime, existing statutory distinctions, and other relevant sources.⁵

Fourth, the Commission decided that the initial guidelines generally should not "make significant changes in current plea agreement practices," U.S. Sentencing Commission, *Guidelines Manual* 1.8 (1987) ("Guidelines Manual"), except to the extent necessary to assure that

⁵ For example, the Commission utilized advanced statistical techniques to estimate the average time served for typically occurring variations of burglary offenses, including the value of the property taken, the degree of planning, the possession of a weapon, and the disposition of the case (e.g., guilty plea or trial). The results of these analyses were then used as an anchoring point for the derivation of the burglary guidelines. In building into the guidelines various offense level adjustments, the Commission excluded some distinguishing characteristics because the data showed they occurred very infrequently. For example, the Commission's database included 1,100 instances of robbery; 40 of those 1,100 involved physical injury to the victim and three involved death. The guidelines for robbery therefore mention "injury to the victim" as a separate aggravating factor. They do not include "death," because death rarely occurred in connection with a prosecuted robbery charge, and the Commission felt that rare occurrences could be addressed by a court as a basis for departure from the guidelines, or by the Government as a separately charged offense. See U.S. Sentencing Commission, *Preliminary Observations of the Commission on Commissioner Robinson's Dissent* 3 (May 1, 1987).

the purposes of the Sentencing Reform Act and the guidelines were not undermined.⁶

As Congress had instructed, the Commission did not limit its role only by narrowing the range of variance in past sentencing norms. In some discrete areas the Commission consciously departed from historical sentencing practices. In so doing the Commission followed Congress's directive that it not be "bound" by current practices, but that it should develop a sentencing range consistent with the overall purposes of sentencing articulated by Congress in the statute. The Commission therefore sought to *rationalize*, rather than mirror, the prior sentencing regime and to prohibit the use of certain previously-employed criteria in sentencing. Thus, "[t]he guidelines represent an approach that begins with and builds upon empirical data, but does not slavishly adhere to current sentencing practices." *Supplementary Report* 17. See 28 U.S.C. § 994(m).

For example, as petitioner Mistretta notes (Br. 9 & 50), the Commission's guidelines increase the length of sentences for white collar crimes, the major change being that many white collar offenders, who would previously have received only probation, will now receive one to five months of confinement. See, e.g., Guidelines Manual §§ 5B1.1(a)(2); 5C2.1(e); 5F5.1. But this policy choice was *not* an independent initiative of the Commission. Congress clearly expressed its determination that white collar crime had been underpunished in the past and was, for that reason, an "otherwise serious offense" within the meaning of 28 U.S.C. § 994(j). See S. Rep. No. 98-225, *supra*, at 91-92. This congressional determination

⁶ Nevertheless, the Commission believed that the guidelines would have a positive effect on plea bargaining for two reasons: first, "the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place," *id.*, and, second, "the guidelines create a norm to which judges will likely refer when they decide whether, under [Fed. R. Crim. P.] Rule 11(e), to accept or to reject a plea agreement or recommendation." *Id.*

is also echoed in the statutory command that the sentencing guidelines be "entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. § 994(d).⁷

Other departures from historical sentencing practices likewise implement public policy choices that had been made in the first instance by Congress and not the Commission. For example, Congress required that the Commission provide sentences at or near the statutory maximum for "career offenders"—*i.e.*, adult offenders who have been convicted of a third crime of violence or drug-related offense. 28 U.S.C. § 994(h). By the same token, Congress required that the Commission provide a substantial term of imprisonment for, among others, offenders who derive a substantial portion of their income from criminal activity or who are managers or supervisors involved in a pattern of racketeering activity. 28 U.S.C. § 994(i). And Congress directed the Commission to ensure that the guidelines reflect "the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j).

⁷ Consistent with 28 U.S.C. § 994(d), one of the most important objectives sought to be achieved through the guidelines is that of ending various forms of individual discrimination found to pervade past sentencing practices. Available data clearly showed that women were treated more favorably, and black defendants were discriminated against, in connection with sentencing for certain types of crimes and in certain regions of the country. For example, female bank robbers were likely to serve six months less than their similarly situated male counterparts and black bank robbers sentenced elsewhere. See *Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Cong., 1st Sess. 676 (1987) (statement of Commissioner Nagel). Moreover, women convicted of fraud served, on average, three and a half months less than similarly situated men. A defendant sentenced in the West was likely to serve an extra three months on that basis alone. *Id.* at 680. In districts with a high volume of heroin cases, Hispanic defendants went to prison significantly more often than non-Hispanic defendants. *Id.* at 683.

Here, too, the guidelines conform to the Act by providing significantly increased penalties for career offenders who have “committed an offense as part of a pattern of criminal conduct from which [they] derived a substantial portion of [their] income” (*Guidelines Manual* § 4B1.3); and an increased sentence for offenders who are organizers, leaders, managers or supervisors of “a criminal activity that involved five or more participants or was otherwise extensive” (*Id.*, § 3B.1). In the area of drug related crimes, the guidelines reflect, as they were required to do, the mandatory minimum sentences contained in the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986). *Supplementary Report* 18.⁸

In sum, the sentencing guidelines at issue do not represent the Commission’s own idiosyncratic or policy choices among widely-divergent sentencing alternatives; they reflect the broad legislative consensus on sentencing policy that was articulated in the Sentencing Reform Act. The guidelines incorporate existing sentencing practices, with the adjustments necessary to accomplish Congress’ goals of consistency and proportionality and to eliminate regional, sexual, racial and other indefensible disparities. To the extent that the guidelines do depart from past practice, this departure reflects a *congressional* determination that a new approach was needed. Contrary to petitioner Mistretta’s assertion (Br. 54), *Congress* made the “hard policy choices” and “political judgments” and the Commission faithfully and successfully implemented *Congress’s* mandate.⁹

⁸ With the exception of implementing such congressionally-mandated changes, the guidelines’ net effect is not enormously different from the average prior practice. The Commission’s Prison Impact Study, using two different sets of assumptions, predicted that over 15 years the guidelines’ effect on the prison population would be between -2% and $+10\%$, but for the congressionally-mandated drug and career offender sentences. *Supplementary Report* 75.

⁹ If further proof were required that the guidelines fully implement the intentions of the statute, it is supplied by Congress’s re-

**E. If The Goals Of Sentencing Reform Are To Be Achieved,
The Constitutionality Of The Sentencing Commission
Must be Sustained.**

As years of congressional effort poignantly demonstrate, the task of developing an initial, detailed set of sentencing guidelines required establishing a *permanent, independent commission* of experts. Moreover, Congress recognized that the ongoing need for monitoring, analyzing and revising the guidelines was as much a part of sentencing reform as writing the initial guidelines themselves; this, too, called for an independent, permanent body to oversee the reform effort. This point is well illustrated by several examples of areas in which the Commission has indicated that it might make revisions in the light of experience.

First, the number of subcategories that the guidelines draw within each major offense and offender category may turn out in some (or many) instances to be too great for administrative ease, or too few to meaningfully discriminate between offenders who warrant different punishments. For example, as noted above, the Commission did not include death as an aggravating factor in the bank robbery guideline because of the infrequency with which death has historically occurred in association with that offense. Obviously, new experience could reveal the need for change, perhaps to bring death within the guideline, perhaps to subdivide "injury" more finely,

fusal to delay their effective date. Pursuant to Section 235(a)(1)(B)(ii) of the Act, the guidelines did not take effect until six months after their submission to Congress, to allow Congress the opportunity to enact legislation amending or abolishing the Commission's work product. After the Commission promulgated the final guidelines, as amended, on May 1, 1987, the House and Senate Judiciary Committees held hearings on the guidelines, and bills were considered to delay their effective date. See, *e.g.*, 133 Cong. Rec. H8107 *et seq.* (daily ed. October 5, 1987); 133 Cong. Rec. H8142 *et seq.* (daily ed. October 6, 1987). Delay legislation was subsequently rejected by a substantial margin (133 Cong. Rec. H815 (daily ed. October 5, 1987)), and the guidelines went into effect, as scheduled, on November 1, 1987.

perhaps to reduce the number of injury subcategories from three (as now) to one. The Commission cannot know what, if any, refinement is appropriate until it sees how judges actually apply this guideline, under what circumstances they depart, and why.

By way of another example, the guidelines, drawing in part upon past practice, require an increase in punishment by two levels where "the defendant abused a position of public or private trust, or used a special skill." Guidelines Manual § 3B1.3. The terms used are general, and the Commission may find them applied differently by different courts. Monitoring the way in which courts apply such terms might persuade the Commission to define them, possibly through example, or it might encourage the Commission to abandon the effort to distinguish among defendants upon this basis because this approach is too complex and actually fosters disparity. Whether and how the guidelines should be revised, in short, requires careful and ongoing examination of how the courts actually apply them. A permanent, independent body whose sole function and expertise relates to the guidelines is best suited for the task.

As a final example, the Commission has initially decided largely to maintain existing plea bargaining practice under guideline sentencing, with some important changes. Counsel are required to set forth the relevant facts of the actual offense conduct and explain their reasons for offering and accepting a plea bargain. In turn, the court (under Fed. R. Crim. P. 11(e)) must explain its reasons for accepting a plea agreement. *Guidelines Manual* § 6B. The Commission will collect and analyze these reasons, which will permit it to understand the dynamics of bargaining under a guidelines system and why judges accept or reject pleas. Only then will the Commission be able to determine the extent to which the fact of a bargain ought to affect the length of a sentence and the need for further regulatory reform.

For the reasons discussed above, the Commission, unlike Congress itself, is institutionally capable of dealing with the problem of making continuing changes such as these in a complex and closely-interrelated set of rules. Furthermore, in order to carry out the evolutionary tasks that Congress assigned it, the Commission must continually require sentencing officials to provide detailed sentencing information, *see* 28 U.S.C. § 995(a)(13), (15); monitor and evaluate their performance, *id.*, § 995(a)(9); and engage these sentencing officials in a continual interchange of information and views. *Id.*, § 995(a)(17)-(18). Congress believed that assigning such roles to an agency within the judicial branch would be less intrusive into judicial independence and more conducive to a cooperative approach in carrying out these objectives, as well as to the important related tasks of ongoing sentencing research and education.¹⁰

In sum, both Congress in the Sentencing Reform Act, and the Commission in promulgating its initial guidelines and policy statements, envisioned an evolutionary process. This process will work, if at all, and the goals of sentencing reform will be achieved, *only* if the constitutionality of the Sentencing Commission—an independent, undistracted and expert body—is sustained.

CONCLUSION

The sentencing guidelines under which petitioner Mistretta was sentenced represent the product of an intensive, bipartisan effort to solve the problems of sentencing disparity and uncertainty of punishment. After years of congressional debate, and following attempts by Congress itself to reform federal criminal sentencing practices in

¹⁰ The Judicial Conference of the United States had initially proposed that it be given the authority to issue sentencing guidelines. *See* S. Rep. No. 98-225, *supra*, at 63-64. Although Congress ultimately gave this authority to a new commission, it took care to assure that the commission would coordinate its activities with existing judicial branch agencies. *Id.* *See also* 18 U.S.C. § 995(b).

the context of revisions to the federal criminal code, Congress concluded in its wisdom that the only way to achieve effective sentencing reform was to delegate some of its power to an expert Sentencing Commission. The Commission would then promulgate uniform sentencing guidelines in accordance with detailed statutory standards. At the same time, Congress concluded that the division of sentencing authority among courts and the Parole Commission should be eliminated and that the entire sentencing function should be consolidated in the courts, with the essential caveat that judicial sentencing discretion would be structured and limited by a system of sentencing guidelines. Simply stated, Congress concluded, after years of false starts, that delegation to the Sentencing Commission was the only way to assure meaningful federal criminal sentencing reform. Such a delegation is entirely consistent with past congressional practice and with this Court's approval of Congress's actions.

As it has in the past, this Court should defer to Congress's policy judgment as to what is "necessary and proper" in the area of sentencing federal offenders. The validity of the Sentencing Reform Act of 1984 should be upheld and the judgment of the district court should be affirmed.

Respectfully submitted,

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